

1-1-1988

The Sports Lawyer's Duty to Avoid Differing Interests: A Practical Guide to Responsible Representation

Robert E. Fraley

F. Russell Harwell

Follow this and additional works at: https://repository.uchastings.edu/hastings_comm_ent_law_journal

 Part of the [Communications Law Commons](#), [Entertainment, Arts, and Sports Law Commons](#), and the [Intellectual Property Law Commons](#)

Recommended Citation

Robert E. Fraley and F. Russell Harwell, *The Sports Lawyer's Duty to Avoid Differing Interests: A Practical Guide to Responsible Representation*, 11 HASTINGS COMM. & ENT. L.J. 165 (1988).

Available at: https://repository.uchastings.edu/hastings_comm_ent_law_journal/vol11/iss2/1

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Communications and Entertainment Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

The Sports Lawyer's Duty to Avoid Differing Interests: A Practical Guide to Responsible Representation

by ROBERT E. FRALEY*
and F. RUSSELL HARWELL**

Introduction

American professional athletes have not always sought personal representation. Indeed, the "sports agent,"¹ the best known representative of sports personalities,² has gained prominence only in the past two decades.³ Players' increasing reliance on representatives—primarily in connection with player contract negotiations—is directly traceable to several developments.

* B.S. 1975, J.D. 1979, University of Alabama; LL.M. 1980, University of Florida. The author, of Fraley & Associates, P.A., in Orlando, Florida, serves as counsel for various professional and amateur sports interests, including players, coaches, and teams.

** B.A. 1986, University of Alabama. Member, Third Year Class, University of Alabama School of Law.

1. A sports agent serves the role of agents in other areas generally. Such persons act for, or in the place of, another by authority from him or represent another in contractual negotiations. RESTATEMENT (SECOND) OF AGENCY § 1 (1958). Sports agents are not the focus of this Article, yet are mentioned in various places, due to the common overlap of the roles of lawyers and agents. For a more detailed look at sports agents, see J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* §§ 3.17-3.19 (1979); Sobel, *The Regulation of Sports Agents: An Analytical Primer*, 39 BAYLOR L. REV. 701 (1987); Note, *Regulation of Sports Agents: Since at First It Hasn't Succeeded, Try Federal Legislation*, 39 HASTINGS L.J. 1031 (1988); Comment, *The Agent-Athlete Relationship in Professional and Amateur Sports: The Inherent Potential for Abuse and the Need for Regulation*, 30 BUFFALO L. REV. 815 (1981); Neff, *Den of Vipers*, SPORTS ILLUSTRATED, Oct. 19, 1987, at 74.

2. While this Article frequently refers to professional athletes in the three major team sports of football, basketball, and baseball, agents represent athletes in every professional sport, and frequently, other professional sports personalities such as coaches.

3. One earlier appearance of the sports agent was in 1925, when legendary football player Red Grange, with negotiation help from his "manager" Charles C. "Cash and Carry" Pyle, signed a \$100,000 contract with the National Football League's Chicago Bears. See Ruxin, *Unsportsmanlike Conduct: The Student Athlete, the NCAA, and Agents*, 8 J. C. & U. L. 347 (1981-82) (quoting M. PACHTER, CHAMPIONS OF AMERICAN SPORT 266 (1981)).

The invalidation of reserve and option clauses⁴ in professional sports player contracts may be viewed as one event which spurred on professional representation of athletes.⁵ Players enjoy increased bargaining leverage since they are no longer "perpetually bound to their teams."⁶ The emergence of rival leagues and the subsequent bidding for available talent⁷ also contribute to players' reliance on representatives. Addi-

4. Inclusion of a clause in a standard player contract entitling the team to a one-year renewal is commonly referred to as an option clause, while provisions giving the team perpetual rights to the player's services are categorized as reserve clauses. J. WEISTART & C. LOWELL, *supra* note 1, § 3.12, at 283.

5. Attorneys representing athletes are variously labeled as "sports lawyers," "sports attorneys," or "attorney-agents." Lawyers serving the same roles as agents are often incorrectly labeled "sports agents." *But see infra* note 79 (some lawyers, when entering this field, expressly attempt to segregate the roles of agent and lawyer). For the purposes of this Article, members of the legal profession working on legal matters in the sports domain are "sports lawyers." The definition of sports law covers a multitude of areas, including labor law issues, rules and regulations of amateur sports, constitutional issues, personal injury litigation, and even copyright law. *See* Hochberg, *Sports Law, Anyone?*, SPORTS INC., Aug. 15, 1988, at 44-45 (discussing the difficulty in defining sports law, because the area is really an amalgam of various legal disciplines). The sports lawyer, as used in this Article, encompasses one of the more well-known areas of sports law: the personal representation of professional athletes and other personalities. This particular area of work on occasion will be referred to as the "representation industry," lawyers or agents representing those athletes in the three major team sports, and the numerous other professional sports.

6. Sobel, *supra* note 1, at 704 (citing Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, 351 F. Supp. 462 (E.D. Pa. 1972)). This right of a team to renew a player's contract without the player's consent at the end of its original term was often rejected in the mid-1970's on antitrust grounds. *See, e.g.*, Robertson v. NBA, 389 F. Supp. 867 (S.D.N.Y. 1975); Flood v. Kuhn, 407 U.S. 258 (1972). Such litigation spurred "more serious bargaining between the club owners and the players, and the consequence of these negotiations has been that contract renewal clauses have either been eliminated or rewritten to specifically provide for a single year renewal." J. WEISTART & C. LOWELL, *supra* note 1, § 3.12, at 285.

7. The most flamboyant bidding for available talent may have been between the National Football League (NFL) and the now-defunct United States Football League (USFL). It was not uncommon during the 1983 and 1984 seasons for teams in both leagues to offer million dollar salaries. *See, e.g.*, M. TROPE, NECESSARY ROUGHNESS 10 (1987) (The author, a former sports agent, states that, following the birth of the USFL in 1983, the "marketplace changed drastically." Trope negotiated a \$7.3 million contract with the New York Giants of the NFL for star Lawrence Taylor, who had secretly signed a long-term contract with rival team owner Donald Trump and his team, the New Jersey Generals of the USFL.). Prior to the 1980's other rival leagues undoubtedly began the trend towards the use of player representatives. *See, e.g.*, Detroit Football Co. v. Robinson, 186 F. Supp. 933, 934 (E.D. La. 1960), *aff'd*, 283 F.2d 657 (5th Cir. 1960) (rivalry for talent between the NFL and old American Football League "but another round in the sordid fight for football players"); Washington Capitols Basketball Club, Inc. v. Barry, 419 F.2d 472 (9th Cir. 1969) (dispute over player Rick Barry's contract between teams of the National Basketball Association (NBA) and old American Basketball Association).

tionally, the increase in televised coverage of sporting events has caused the sports industry to approach the larger business of entertainment in terms of public appeal.⁸ As a result, athletes are now in a position to earn additional income from other sources, most notably product endorsements.⁹

The growing use of the agent has directly impacted amateur and professional sports. Professional athletes now command higher salaries than ever,¹⁰ with the agent responsible for a portion of the increase.¹¹ Agents do not merely serve to increase players' salaries; they assist in a multitude of areas such as managing a player's income,¹² procuring product endorsement income,¹³ and generally allowing athletes to concentrate on their athletic performance instead of their off-the-field pursuits.¹⁴

The rise of the agent has also indirectly affected the legal profession. Although agent representation has provided many benefits, it has caused considerable damage to numerous interests, primarily those of the athlete.¹⁵ Fraudulent "investment

8. G. SCHUBERT, R. SMITH & J. TRENTADUE, *SPORTS LAW* 126 (1986) (radio and television, including cable and pay television, provide for expanded viewing audiences, increasing the popularity and salaries of athletes; "Players, like actors in the entertainment industry, have become the focus of much of this media attention, and like their acting counterparts, they have come to expect compensation for their personality status as well as for their athletic performance." *Id.*).

9. Endorsements for sports clients could present a lawyer with a potential conflict of interest. See *infra* notes 111-24 and accompanying text. Other reasons for the emergence of the player representative are (1) the increase in player salaries caused a need for tax planners in the negotiation process, and (2) the "metamorphosis" of players associations into true labor unions. Sobel, *supra* note 1, at 704.

10. For example, in 1987, the top 100 income earners in sports averaged over \$1,400,000, a dramatic increase from the previous four years. See *The 100 Highest-Paid Athletes*, *SPORT*, June 1988, at 23. Also, in the six years from 1982 to 1988, the number of millionaire sports personalities went from 23 to 118. *Sport 100: Who Makes What in Sports*, *SPORT*, June 1988, at 23.

11. See, e.g., Bulkely, *Sports Agents Help Athletes Win—and Keep—Those Super Salaries*, *Wall St. J.*, Mar. 25, 1985, at 31, col. 4.

12. See *infra* note 16 and accompanying text.

13. See *infra* notes 111-24 and accompanying text (agent may, depending on client's market potential, engage in procuring product endorsements).

14. "[P]layer agents are now generally accepted as a permanent, highly visible, and at times positively beneficial, element in the sports labor relations process." INQUIRY INTO PROFESSIONAL SPORTS: FINAL REPORT OF THE SELECT COMMITTEE ON PROFESSIONAL SPORTS, H.R. REP. NO. 94, 94th Cong., 2d Sess. 70 (1977) [hereinafter *INQUIRY INTO PROFESSIONAL SPORTS*]. See generally R. RUXIN, *AN ATHLETE'S GUIDE TO AGENTS* 17-21 (1982).

15. In defense of sports agents, an effort has been made to improve their ethical standards in representation. The Association of Representatives of Professional Athletes (ARPA), founded in 1978, has a Code of Ethics and an organized continuing

advice"¹⁶ and "overly aggressive client recruitment practices"¹⁷ by agents, particularly the "early signings" of eligible student-athletes of the National Collegiate Athletic Association (NCAA), have harmed athletes at various stages in their careers.¹⁸ Conservative estimates of early signings indicate that they are running rampant.¹⁹ Sports agents contribute not only to the cutting short of athletes' collegiate careers but also to embarrassing academic institutions.²⁰

education program. ARPA addresses many of the same issues as the various ethical codes of the legal profession. See ARPA CODE OF ETHICS, *reprinted in* G. SCHUBERT, R. SMITH & J. TRENTADUE, *supra* note 8, at 284-90 [hereinafter ARPA CODE OF ETHICS]. The primary criticism of these efforts centers on the problem of enforceability. See Sobel, *supra* note 1, at 723 (noting that because ARPA membership is not legally required of agents, the ARPA Code of Ethics is not effective in remedying inadequacies of the law in deterring abuses by sports agents).

16. See, e.g., Papanek, *A Lot of Hurt: Inaction Got Kareem Creamed*, SPORTS ILLUSTRATED, Oct. 19, 1987, at 89-96 (describing how NBA star Kareem Abdul-Jabbar, after signing a broad representation agreement with sports agent Tom Collins, charged Collins with improprieties ranging from breach of fiduciary duty to negligent misrepresentation for allegedly lending huge sums of his money to other players, and entering partnerships with personal liability for the entire investment). See generally J. WEISTART & C. LOWELL, *supra* note 1, § 3.17, at 320 n.705 (reporting a case of an agent misappropriating his client's money and pleading guilty to seven counts of grand larceny).

17. Sobel, *supra* note 1, at 714.

18. The NCAA is a voluntary organization made up of most major collegiate institutions across the country. Rules of that association, which bind all member-schools, state that athletes may not enter into any type of agreement with agents or lawyers for the marketing of the individual's athletic skills, prior to the expiration of that individual's eligibility to participate in college athletics. See *infra* notes 140-44 and accompanying text.

19. It has been estimated that over one-half of the top NFL prospects every year have signed such agreements before their college eligibility has expired. See Bannon, *Ex-agent: 80% Sign in School*, USA Today, Dec. 17, 1987, at C1, col. 4 (quoting various sports agents in their estimates of how many of the top 330 senior college football players usually have accepted money from agents or signed with them prior to ending their eligibility). See also M. TROPE, *supra*, note 7, at 77 (Former sports agent Mike Trope claims that, during his time as an agent, about 60 percent of the players drafted by the NFL in the first three rounds had "made a commitment, in one form or another, to an agent before their senior season ended."); R. RUXIN, *supra* note 14, at 35-36 (reporting that 60 to 75% of NFL draftees had made agent commitments prior to NCAA eligibility expiration).

One can only imagine the degree of contact with amateur athletes that does not result in an actual signed representation agreement. See, e.g., Powers, *Coaches, Athletes Are Artful Hustlers, Too*, SPORTING NEWS, Nov. 16, 1987, at 12 (Sports agents Norby Walters and Lloyd Bloom "crisscrossed the country for the last two years, making pitches to virtually every football player they thought might go in the first three rounds of the NFL draft.").

20. The NCAA imposes a number of penalties on both athletes and their institutions for unauthorized contact between eligible athletes and agents. Athletes have been ruled ineligible for future amateur competition, while penalties levied against

One agent was convicted in a state court for tampering with a sporting event.²¹ Two other agents were federally indicted on mail fraud, racketeering and conspiracy to commit extortion charges.²² The latter case, which arose from two agents' dealings with some 44 student-athletes, has been characterized as "one of the most significant indictments ever involving American sports."²³ The two agents, formerly in the en-

universities have included forfeitures of team victories and tournament winnings. See, e.g., Horn, *Intercollegiate Athletes: Waning Amateurism and Rising Professionalism*, 5 J. C. & U. L. 97, 98 (1978) (Villanova University forfeited its 1971 runner-up finish in the NCAA Basketball Tournament as one of its players, Howard Porter, signed an agency agreement prior to the season's end.). The University of Alabama, for example, was forced to relinquish \$250,000 in NCAA post-season basketball winnings in 1987 after playing two ineligible players, both of whom had signed representation agreements with sports agents. The NCAA ruled that one of the players, Derrick McKey, was ineligible for the remainder of his college career. See *infra* note 21. Additionally, the recent highly-publicized indictment of sports agents Norby Walters and Lloyd Bloom involved many academic institutions whose athletes were involved with the agents. These institutions included Southern Methodist University, University of Pittsburgh, University of Kentucky, University of Texas, University of Iowa, and Temple University. See *infra* notes 22-25 and accompanying text.

21. See Mortensen, *Walters Will Go on Trial Today, Alabama Prosecutor: 'We're Going to Show These Agents,'* Atlanta Const., May 9, 1988, at D1, col. 5; Mortensen, *Walters, Alabama Negotiate: Agent to Repay \$200,000*, Atlanta Const., May 10, 1988, at E1, col. 2 (both describing indictments and the subsequent settlement of New York agent Norby Walters on charges brought by the state of Alabama for commercial bribery, deceptive trade practices, and tampering with a sports contest, resulting from his and partner Lloyd Bloom's dealings with University of Alabama basketball players Derrick McKey and Terry Coner). A settlement followed the Alabama conviction (which was later overturned on appeal) of agent Jim Abernethy for tampering with a sports contest, and the plea bargain of Bloom for the misdemeanor charge of deceptive trade practices. See Scorecard, *Soft Time*, SPORTS ILLUSTRATED, May 23, 1988, at 13. Commentators have stated that, although the state's attempts to keep unscrupulous agents away from college athletics is to be commended, the sentence chosen for Bloom—washing state trooper cars for one week—was "laugh[able]." The sentence chosen should have been more closely associated with the charge, such as performing community services. *Id.*

22. See Grand Jury Indictment, United States v. Walters & Bloom, No. 88-CR-709 (N.D. Ill. filed Aug. 24, 1988) [hereinafter Walters Indictment]. New York sports agents Norby Walters and Lloyd Bloom were indicted following a seventeen month investigation by the FBI. The standard sales pitch of the agents was an offer of between \$2500 and \$5000 cash up front, followed by monthly payments of \$250, in return for the exclusive right to represent the players when they turned professional. *Id.* The grand jury also charged sports agent David Lueddeke with perjury and obstruction of justice. See Grand Jury Indictment, United States v. Lueddeke, No. 88-CR-709 (N.D. Ill. filed Aug. 24, 1988).

23. Selcraig, *The Deal Went Sour: Sports Agents Norby Walters and Lloyd Bloom Were Indicted for Racketeering and Extortion*, SPORTS ILLUSTRATED, Sept. 5, 1988, at 32.

tertainment industry, piloted a "kamikaze"²⁴ venture into sports representation, including enlisting the help of a reputed organized crime family to threaten student-athletes.²⁵ This type of behavior has led to an onslaught of legislation seeking to regulate sports agents.²⁶

These incidents have damaged the reputations of those in the representation industry. Athletes, in choosing a representative, are increasingly turning to lawyers to perform services²⁷ formerly provided by agents. Over fifty percent of those actively involved as representatives in the three major professional sports leagues are lawyers.²⁸ An even higher percentage of America's top football players use lawyers as representatives.²⁹

24. *Id.*

25. Walters Indictment, *supra* note 22, at 3-6. The indictment includes numerous references to organized crime figure Michael Franzese, who was used by the agents to threaten wayward clients with physical harm. When several athletes, following the signing of a representation agreement with the agents, attempted to cancel the relationship, the agents were said to have made threats to "break the legs" of the athletes. *See id.* at 54 (quoting agent Lloyd Bloom, upon learning of University of Texas football player Everett Gay's retaining another agent, as saying that "we can get someone from Vegas to come down to see that Everett Gay doesn't play football again"). *See also id.* at 53 (Bloom telling University of Iowa football player Ronald Morris that payments made to Morris were from "bigger backers" from Los Angeles who "don't care about what they do," including blowing up the house of Morris' new agent).

26. Up until several years ago, the sports agent was largely unregulated. *See* Comment, *supra* note 1, at 828-30. Spurred by the conduct of several agents, in particular Norby Walters, Lloyd Bloom, and Jim Abernethy, some eighteen states have enacted legislation requiring agents (anyone serving in that role) to be certified. *See generally* Sobel, *supra* note 1, at 724; Kohn, *Sports Agents Representing Professional Athletes: Being Certified Means Never Having to Say You're Qualified*, 5 ENT. & SPORTS LAW. 1 (1988). As of December 1988, these states, while passing the laws, have generally not verified compliance and provided enforcement.

27. Attorneys typically begin their services with professional sports contract negotiation, and follow with other legal services including estate planning, negotiation for insurance protection, investment advice, and counseling the athlete about careers after sports.

28. Of the 227 representatives registered with the National Basketball Players Association (NBPA) and the NBPA Committee on Agent Registration and Regulation, 134 (59%) indicate that they are members of the legal profession. Information provided by Lori Weisman, Administrative Assistant to the NBPA (Aug. 1, 1988).

29. The top 10 draft choices in the National Football League from 1985-88 selected attorneys as agents 78% (31 of 40) of the time. Information provided by Mike Duberstein, Director of Research, National Football League Players Association (Aug. 1, 1988).

Major league baseball provides another example of this movement. "There has been an increasing move over the past five years for players to be represented by attorneys. Out of the 150 people that are currently representing players, between 50 and 60 percent actually are attorneys. Out of the 25 people that represent the major-

This shift toward the legal profession is likely to cause fierce competition among lawyers paralleling the existing competition among non-lawyer sports agents. This scenario requires lawyers to pay special attention to the ethical rules of the legal profession.

This Article will examine the sports lawyer and one ethical rule: the obligation to avoid conflicts of interest. Numerous examples of conflicts of interest in sports representation, as in the legal profession generally,³⁰ exist. Sports lawyers currently work for management firms³¹ that not only provide personal representation to athletes, but also invent and organize sporting events in which those athletes appear.³² Additionally, lawyers have simultaneously represented a professional league players association in collective bargaining with management, and individual members of that players union.³³

This Article, while emphasizing lawyers and the various ethical mandates of the legal profession, also has general applicability to the sports agent, who, as a fiduciary under agency law, remains bound by conflict of interest standards.³⁴

Part I of this Article details the rules of ethics³⁵ and reviews

ity of the players, even a larger percentage are attorneys." Telephone interview with Arthur Shack, Counsel to the Major League Baseball Players Association (July 21, 1988).

Additionally, the number of attorneys bringing suit on behalf of defrauded athletes has increased. See Neff, *supra* note 1, at 76 (noting that San Francisco attorney Ed King has made a lucrative practice out of suing agents and advisers who defrauded athletes, and quoting King: "If the worst you can say about one of [the agents] is that he is incompetent, that probably puts him among the top five percent in the sports business").

30. See *infra* note 36.

31. These firms provide athlete-clients with multiple "in-house" services, including the negotiation of player contracts, financial services (such as budgeting and investment advice), and other services. See *infra* notes 152-54 and accompanying text. Although there are currently three large sports management firms, the number of sports management firms has increased markedly. See *infra* note 152.

32. See *infra* notes 150-79 and accompanying text.

33. See *infra* notes 145-49 and accompanying text.

34. See *infra* notes 75-96 and accompanying text.

35. Analysis will focus primarily on the AMERICAN BAR ASSOCIATION'S MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969) [hereinafter ABA CODE] and the MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter MODEL RULES], including comments to the rules, as applied to the sports representation industry. For general purposes, the various ABA Code provisions and their significance should be mentioned. Nine Canons make up the Code; each Canon expresses standards of professional behavior required of attorneys. Ethical Considerations and Disciplinary Rules are derived from each Canon. An Ethical Consideration represents the ethical goals toward which all lawyers should strive, while a Disciplinary Rule is mandatory

a noted conflict of interest case involving basic fiduciary principles. Part II outlines and discusses examples of conflicts of interest in sports representation. These include representation of sports clients with competing team and endorsement interests, the inherent conflicts in fee arrangements, advising the amateur athlete without jeopardizing amateur status, players association representation, event management, and the representation of both coaches and players. Part III of the Article offers a set of guidelines for practicing sports lawyers and agents to avoid conflict of interest problems. The Article concludes by proposing that the most efficient manner for sports lawyers and agents to avoid damaging conflicts of interest is a self-enforced narrowing of the scope of their representation of multiple clients.

I

Lawyer's Duty to Avoid Conflict of Interest

Conflicts of interest have been described as one of the most troublesome problems facing the legal profession.³⁶ Although other ethical issues may be more prevalent in sports representation,³⁷ representing conflicting interests remains at the forefront in the sports area, as in the legal profession generally.³⁸ Under the Model Rules of Professional Conduct (Model Rules), lawyers are forced to decline representation of a client if (1) that representation will be directly adverse to another client, or (2) the lawyer's personal interests "materially limit"

and establishes a minimum level of ethical conduct required to avoid disciplinary sanctions. See generally Kutak, *A Commitment to Clients and the Law*, 68 A.B.A. J. 804 (1982).

36. C. WOLFRAM, *MODERN LEGAL ETHICS* 313 (1986). See also Comment, *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1247 (1981) (stating that "[f]rom 1908 to the present, the lawyer with conflicting interests has provided bench and bar with one of the toughest problems in legal ethics"). See generally Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211 (1982); O'Dea, *The Lawyer-Client Relationship Reconsidered: Methods for Avoiding Conflicts of Interest, Malpractice Liability, and Disqualification*, 48 GEO. WASH. L. REV. 693 (1980).

37. For example, the issue of in-person client solicitation is consistently discussed as an abuse by sports lawyers. Members of the legal profession, unlike sports agents, are forbidden from recommending themselves for legal employment to a prospective client when that client has not sought advice. MODEL RULES, *supra* note 35, Rule 7.3; ABA CODE, *supra* note 35, DR 2-103(A).

38. For sources discussing conflicts in the sports representation area, see *infra* note 98.

his responsibilities to the client.³⁹ The discussion in the following section examines the conflict of interest mandates which face the sports lawyer—both from the perspective of the policy behind the rules, and the rules themselves.

A. Underlying Policy Considerations: Loyalty and Confidentiality

The basis of the conflict of interest rules is that a lawyer must provide a client with unmitigated loyalty throughout the representation.⁴⁰ This "zealous"⁴¹ loyalty is an essential element of the lawyer's responsibility to a client.⁴² However, various interests in the sports context⁴³ may impair the requisite vigorous representation.

The principle of confidentiality is an equally important underpinning of the conflict of interest rules.⁴⁴ The attorney-client privilege assures clients confidentiality, and thus encourages individuals to seek legal services.⁴⁵ Representation of adverse interests may threaten the free flow of information, which serves as the primary purpose of the attorney-client privilege,⁴⁶ since confidential information received from one

39. See *infra* text accompanying note 68 for full text of the rule.

40. Canon 5 of the ABA Code requires the attorney to maintain undivided loyalty, while advising each client of his best course of action. ABA CODE, *supra* note 35, EC 5-1 reads:

The professional judgment of a lawyer should be exercised within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

41. ABA CODE, *supra* note 35, EC 7-1 ("The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law . . .").

42. MODEL RULES, *supra* note 35, Rule 1.7 comment.

43. See *infra* notes 101-10 and accompanying text.

44. See generally C. WOLFRAM, *supra* note 36, at 316; L. PATTERSON & E. CHEATHAM, THE PROFESSION OF LAW 229 (1971). The attorney has an obligation to protect these confidences, defined by the ABA Code as information protected by the attorney-client privilege. The obligation includes protecting "secrets," defined as "other information gained in the professional relationship." ABA CODE, *supra* note 35, DR 4-101(A). See also MODEL RULES, *supra* note 35, Rule 1.6 (lawyer must not reveal information related to the representation of a client, absent consent, or those disclosures "impliedly authorized in order to carry out the representation").

45. See MODEL RULES, *supra* note 35, Rule 1.6 comment ("The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.").

46. See *id.* The confidentiality requirement is a fundamental principle in the

client may be used to that client's disadvantage when the lawyer is representing a third party.⁴⁷

Although other issues have been raised as to what constitutes a conflict,⁴⁸ breaches of loyalty and confidentiality are the two primary issues for lawyers to consider. Either of these conflicts of interest may arise at any time during the representation of a client.

B. Confidentiality in Sports: Varying Policies

While confidentiality is a major consideration in the area of legal ethics, it is relatively insignificant in sports representation. This results from the nature of the practice.

Lawyers in sports representation often play the same roles as agents, primarily negotiating the athlete's playing contract. The mere fact that lawyers act as agents is not a sufficient reason to alter the confidentiality rules. Non-lawyer agents are obligated not to disclose information gained in the relationship with an athlete if "the athlete has requested [it] to be held confidential or . . . the [agent] knows or should know [it] would be embarrassing or detrimental to the athlete if released."⁴⁹ Nevertheless, most information that an agent learns in a relationship with an athlete will not remain strictly confidential. Even if the client requests confidentiality, the media often discover and disclose contract information.

Contract negotiations may encompass the agent's entire re-

client-lawyer relationship and encourages clients to "communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter."

47. See Liebman, *The Changing Law of Disqualification: The Role of Presumption and Policy*, 73 NW. U.L. REV. 996, 997-98 (1979) (stating that in the course of representing interests adverse to a former client, an attorney may, despite conscientious attempts to resist, subconsciously or inadvertently use his former client's confidences against the client).

48. For example, the broad language of Canon 9 of the ABA Code to avoid "even the appearance of impropriety" is often asserted in these situations to claim lawyer disqualification because of a conflict. The Model Rules, however, omitted this statement as a means of attorney disqualification. Additionally, such a standard has been widely criticized. See C. WOLFRAM, *supra* note 36, at 320-23 (questioning the identity of observers for whom the appearance of impropriety must be avoided and whether it is possible to measure an observer's perception of propriety or impropriety). See also Kramer, *The Appearance of Impropriety Under Canon 9: A Study of the Federal Judicial Process Applied to Lawyers*, 65 MINN. L. REV. 243, 264-65 (1981) (calling Canon 9 a "dangerous and vague standard" which disqualifies counsel based on appearances alone and suggesting that the Canon 9 standard often turns on how different judges suppose that the public might view a given ethical issue, which perception is often in contrast to legitimate concerns of the Bar).

49. ARPA CODE OF ETHICS, *supra* note 15, Rule 4-102.

lationship with an athlete.⁵⁰ While information regarding salary or other terms of employment is generally confidential,⁵¹ these facts are often publicly disseminated by sources other than the lawyer.⁵² This information then becomes part of the "public domain" and thus is beyond the control of the lawyer.⁵³

While the public availability of this information does not require normal confidentiality, many services provided by a sports lawyer will still require strict confidentiality.⁵⁴ Generally, the more akin the sports lawyer's services are to traditional legal services, the more likely that confidentiality rules

50. See J. WEISTART & C. LOWELL, *supra* note 1, § 3.19, at 331 (agent may be appointed for limited purpose of negotiating the athlete's contract with his club, with the termination date of the agent-player relationship set).

51. Information gained in a professional relationship will either be labeled broadly as a "secret," see *supra* note 45, or as falling within the narrower attorney-client privilege. The general requirements for invoking the privilege are as follows: (1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except when the protection is waived. See 8 J. WIGMORE, EVIDENCE § 2292 (1961). The privilege promotes free consultation of legal advisers, allowing an unlimited flow of information between attorney and client, and enabling the attorney to give informed legal advice. *Id.* at § 2291.

52. When an agent completes a negotiation, the news media frequently report details of an athlete's playing contract, such as the amount of the signing bonus, yearly salary, and incentive clauses. Other income sources, such as product endorsements and commercials, are routinely reported. Additionally, players salaries are compared. This is illustrated by reports of the furor in major league baseball over the alleged collusion of the club owners in setting player salaries during the mid-1980's. The *New York Times* reported the income (including base pro-rated share of signing bonus) of all major league baseball players following the 1988 season. See Chass, *Baseball Pay is Reaching Upper Deck*, N.Y. Times, Dec. 13, 1988, at Y53, col. 3.

53. "Our position is that when an attorney claims, for example, that he has confidentiality to protect a player's salary information, that this is not allowed. Our stance is that his claim on confidentiality grounds is not a legal matter—it is simply part of the agent rules that such information must be divulged." Telephone interview with Mike Duberstein, NFLPA Director of Research (July 21, 1988). Negotiated contracts are customarily filed with the various players associations, which prevent a lawyer or agent from attempting to keep such information confidential. See, e.g., Forbes, *Vikings Base Their Salaries on Loads of Incentive Clauses*, USA Today, Dec. 14, 1988, at C3, col. 2 (reporting that the NFLPA distributed its annual salary survey in 1988, despite the refusal of the Management Council, made up of club owners, to disclose these player contracts).

54. For example, an area such as estate planning for a sports client would require lawyers to obey confidentiality standards. Unlike confidentiality, the principle of loyalty, see *supra* notes 40-43 and accompanying text, as related to conflict of interest is not subject to the alterations due to the nature of the sports representation industry.

will apply.⁵⁵ If the lawyer has not been appointed by the athlete for some limited purpose, the majority of information gained during representation, whether or not from salary negotiations, remains confidential.⁵⁶

**C. 1969 ABA Code: Lawyers Must Avoid Representing
"Conflicting" or "Differing" Interests**

The basic duty of a lawyer is to exercise independent professional judgment on behalf of a client. Canon 6 of the 1908 Canons of Ethics initially set the standard by stating that it was "unprofessional to represent conflicting interests."⁵⁷ Disciplinary Rule 5-105(A) of the 1969 ABA Code similarly forbids representing clients who would adversely affect the lawyer's independent judgment; the actual wording employed, though, has been changed to "differing interests."⁵⁸ A differing interest is defined as "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest."⁵⁹

Conflicts may arise in several situations. For example, a former or new client may present an interest that conflicts with a current client's interest under DR 5-105. Moreover, a lawyer's personal interests may clash with those of a client. The ABA Code states that the latter conflict arises if the lawyer's professional judgment on behalf of his client "will be or reasonably may be affected by his own financial, business, property, or personal interests."⁶⁰

A conflict violation under the ABA Code generally disquali-

55. For types of services typically provided by sports lawyers, see *supra* note 27.

56. See *supra* notes 50-51 and accompanying text.

57. ABA CANONS OF PROFESSIONAL ETHICS, Canon 6 (1908).

58. ABA CODE, *supra* note 35, DR 5-105(A). The provision provides in full:

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him representing differing interests, except to the extent permitted under DR 5-105(C) [the provision allowing the representation to continue on disclosure and client consent if it is obvious that each client can be adequately represented].

59. *Id.*

60. ABA CODE, *supra* note 35, DR 5-101(A). The provision provides in full:

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

fies a law firm or solo practitioner, although such a result is arguably not required in every case.⁶¹ Case law varies as to which of the clients the lawyer may continue to represent; the lawyer may not have the choice.⁶²

D. 1983 Model Rules: Clarification With "Directly Adverse" Standard

The drafters of the Model Rules recognized several "deficiencies"⁶³ in the 1969 ABA Code and omitted the ambiguous "appearance of impropriety" rubric.⁶⁴ That standard has been criticized for various reasons, one being that the supposed public perception of a given ethical issue may be in contrast with a legitimate concern of the Bar.⁶⁵

The Model Rules suggest when a lawyer should seek a client's consent if a potential conflict of interest exists.⁶⁶ Under the Model Rules, lawyers must "reasonably believe" that the representation of a client will not be adversely affected because of a conflict of interest. The Model Rules, however, allow such a representation to continue if the client or clients "consent[] after consultation."⁶⁷ The main conflict of interest proviso is Model Rule 1.7, which gauges concurrent representation issues by a "directly adverse" standard. The rule provides as follows:

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
 - (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
 - (2) each client consents after consultation.

61. See, e.g., Miller & Warren, *Conflicts of Interest and Ethical Issues for the Inside and Outside Counsel*, 40 BUS. LAW. 631, 658 (1985) (stating that disqualification is a matter of discretion and equity, with the relevant considerations including whether a party waived its right to such relief by delaying and permitting the attorney to represent other clients well into the course of a matter).

62. See, e.g., *Estates Theatres v. Columbia Pictures Industries*, 345 F. Supp. 93, 100 (S.D.N.Y. 1972). See also *IBM v. Levin*, 579 F.2d 271 (3d Cir. 1978) (holding that if the second client is dissatisfied with and unwilling to consent to the joint representation, the attorney must cease representing the first client).

63. C. WOLFRAM, *supra* note 36, at 315. For an outline of the MODEL RULES' departures from the ABA CODE, see *id.* at 315-16.

64. See MODEL RULES, *supra* note 35, Rules 1.7-1.13.

65. See *supra* note 48.

66. See C. WOLFRAM, *supra* note 36, at 340-41.

67. MODEL RULES, *supra* note 35, Rule 1.7.

- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
- (1) the lawyer reasonably believes the representation will not be adversely affected; and
 - (2) the client consents after consultation.

When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.⁶⁸

The comments to Rule 1.7 distinguish the degree of adversity necessary to constitute a conflict of interest. A lawyer may not act as an advocate against a person the lawyer represents in some other matter, even if the other matter is "wholly unrelated."⁶⁹ The comment qualifies this "adversity" standard by stating that "simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients."⁷⁰

The Model Rules additionally provide general guidelines for a lawyer faced with a potential conflict. They maintain that the critical issue is the likelihood that a conflict will actually result.⁷¹ If a conflict does result, a lawyer must determine whether it will "materially interfere" with his independent professional judgment in determining the most advantageous strategy for a client to pursue.⁷²

The Model Rules require the lawyer to "reasonably believe" that multiple representation will not adversely affect the client.⁷³ It has been argued that this test of the client's "best interest" does little to assist the lawyer in identifying situations where disqualification is the proper course.⁷⁴

68. *Id.* For a discussion of disclosure and consent issues for sports lawyers to avoid improprieties, see *infra* notes 210-38 and accompanying text.

69. MODEL RULES, *supra* note 35, Rule 1.7 comment (Loyalty to a Client).

70. *Id.*

71. *See id.*

72. *Id.*

73. *See* text accompanying *supra* note 68.

74. *See* Moore, *supra* note 36, at 286 (test based on client's "best interest" does little to resolve the present "controversy and confusion over the resolution of typical conflicts dilemmas").

E. Conflicts for the "Sports Agent": A Fiduciary Duty

Even though sports agents are not bound to follow the various codes of ethics governing lawyers, they are, nevertheless, subject to conflict of interest standards generally.⁷⁵ Agents are held accountable and owe duties of loyalty under agency law to their principal-clients.⁷⁶ For example, an agent must not "place himself or voluntarily permit himself to be placed in a position where his own interests or those of any other person whom he has undertaken to represent may conflict with the interests of his principal."⁷⁷

Therefore, even those agents whose representational capacity encompasses exclusively "contract advising"⁷⁸ must avoid conflicts of interest. Any argument that the role of "agent" is separable from that of a lawyer—such as that when a lawyer enters sports representation, she is not bound by the ethical constraints of the legal profession—is rendered faulty.⁷⁹

75. One aspect of conflict of interest, confidentiality of information, applies to both lawyers and agents. However, there are exceptions to confidentiality in the sports representation industry. See *supra* notes 49-56 and accompanying text.

76. See, e.g., *Naviera Despina, Inc. v. Cooper Shipping Co.*, 676 F. Supp. 1134, 1141 (S.D. Ala. 1987) ("agent must not, except where the principal has full knowledge and gives consent, assume any duties or enter into any transaction concerning the subject matter of the agency in which he has an individual interest or represents interests adverse to those of his principal"); *Ramsey v. Gordon*, 567 S.W.2d 868, 870 (Tex. Civ. App. 1978) (contract void at option of principal due to agent's personal interest in transaction); *United States v. Drisko*, 303 F. Supp. 858, 860 (E.D. Va. 1969) (agent, by secretly advancing interests of third party, "placed himself in a position of serving conflicting interests and loyalties").

77. F. MECHEM, *OUTLINES OF THE LAW OF AGENCY* § 500, at 345 (1952). See also H. REUSCHLEIN & W. GREGORY, *HANDBOOK ON THE LAW OF AGENCY & PARTNERSHIP* 123 (1979) (duty of agent loyalty includes duty to act solely and completely for the benefit of principal); J. WEISTART & C. LOWELL, *supra* note 1, § 3.19, at 329 ("There can be little dispute that the agent has a legal duty to avoid conflicts of interest in his representation of his athlete-clients.").

78. "Contract advisor" is the generic term often employed by various bodies that govern persons (whether agents or lawyers) that negotiate professional sports contracts. See, e.g., NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION REGULATIONS GOVERNING CONTRACT ADVISORS (1983) [hereinafter NFLPA REGULATIONS], a section of which is cited *infra* note 237.

79. Lawyers in this area often attempt to segregate the roles of lawyer and agent. As a practical matter, this separation is not always a complete one. A lawyer, for example, while actively recruiting sports clients, might claim that he is not bound by rules such as solicitation, as he is a part of the "agent business" at that point. However, during the same recruiting process, the lawyer will no longer "hold himself out" as only an agent if he explains the advantages of retaining a lawyer over a non-lawyer agent. The purpose for this segregation, typically, is to avoid application of solicitation mandates, rather than conflict of interest rules. The more likely result under either argument is that the lawyer will be held to be practicing a

One case delineating the sports agents' fiduciary duty to her client is *Detroit Lions, Inc. v. Argovitz*.⁸⁰ This case is noteworthy in two respects: first, it applies the agent-principal standard propounded by the Restatement of Agency; and second, it represents one of the few modern judicial statements of conflict of interest (whether in regard to sports agents or sports lawyers).

1. Detroit Lions, Inc. v. Argovitz

a. Facts

This case involved a particularly egregious conflict, since the agent/defendant (Jerry Argovitz) was simultaneously part-owner of a professional football team and representative of a player signing a contract with that team.

Argovitz was negotiating former Heisman Trophy winner Billy Sims' 1983-84 contract with the Detroit Lions of the NFL. During these negotiations, Argovitz began to steer Sims towards the Houston Gamblers of the rival United States Football League, a team in which Argovitz was a 29 percent owner.⁸¹ Despite the fact that negotiations between Argovitz and the Lions were "progressing normally," Argovitz told Sims that the Lions were not interested in his services and that the Lions were not negotiating in good faith.⁸² It was at this point that Sims "negotiate[d] with a team that was partially owned by his own agent."⁸³

The Gamblers' final contract offer, which totalled \$3.5 million over five years, was accepted by Sims on July 1, 1983.⁸⁴ Before Sims signed the contract, Argovitz and Sims discussed the possibility of the Lions matching the Gamblers' financial

secondary, law-related occupation and will be bound by the ethical rules governing all lawyers. See *infra* notes 120-21 and accompanying text.

80. 580 F. Supp. 542 (E.D. Mich. 1984). This case is also discussed in J. WEISTART & C. LOWELL, *supra* note 1, § 3.19 (Supp. 1985). See also *Brown v. Woolf*, 554 F. Supp. 1206 (S.D. Ind. 1983) (denying sports agent's motion for summary judgment in suit brought by former client claiming breach of fiduciary duty by virtue of agent's alleged failure to investigate the financial stability of team, as well as certain deferred compensation issues, guarantees, and agent fees).

81. *Detroit Lions*, 580 F. Supp. at 544. Argovitz was obviously fully aware of this breach of loyalty, as he obtained the signature of Sims on an attempted waiver of any claim that Sims might have against Argovitz "for his blatant breach of his fiduciary duty brought on by his glaring conflict of interest." *Id.* at 546.

82. *Id.* at 544-45.

83. *Id.* at 545.

84. *Id.*

package. Sims, whose "pride was wounded"⁸⁵ since he felt that the Lions were not interested in his services, assumed that the Lions would not match the offer.⁸⁶ Consequently, he advised Argovitz not to initiate any more negotiations with the Lions.

b. Issues

The court heard a great deal of evidence on Argovitz's past "irresponsible" handling of client matters.⁸⁷ However, only Argovitz's conduct while negotiating Sims' contract with the Gamblers was before the court.⁸⁸

The first issue was whether ownership of a team amounts to an indisputable conflict for an agent or lawyer if negotiations on behalf of a player involve that team. The more significant issue was whether Argovitz could disclose his obvious personal interests and obtain consent from Sims after full disclosure of the conflict. One critical aspect of this disclosure and consent was a determination of what level of knowledge should be held as adequate on the part of Sims to vitiate the effects of Argovitz's conflict.

An underlying issue in this case was whether the agent's "self-interest" in the deal voided the transaction at the election of the principal. Once Argovitz's personal stake in Sims' signing with the Gamblers was established as antagonistic to Sims, the question was whether fraud on Argovitz's part could be "presumed,"⁸⁹ thereby giving Sims the option to invalidate

85. *Id.*

86. The evidence showed that Argovitz did in fact tell Sims that he thought the Lions would match the Gamblers' offer, and asked Sims whether he should telephone the Lions. The court, though, found that Sims' decision not to have Argovitz call the Lions was "for purely emotional reasons," i.e., being under the mistaken belief that the Lions had lost interest in his talents. *Id.* Sims later signed a contract with the Lions on December 18, 1983. The Lions, along with Sims, filed a complaint "seeking a judicial determination that the July 1, 1983, contract between Sims and the . . . Gamblers . . . [was] invalid because [Argovitz] breached his fiduciary duty when negotiating the Gamblers' contract and because the contract was otherwise tainted by fraud and misrepresentation." *Id.* at 543.

87. For example, Argovitz not only obtained Sims' waiver of a conflict of interest (which the court labeled as "questionable conduct"), but also failed to "shop" Sims to other employers, as most agents would have done in this situation. Additionally, Argovitz's fee structure was unfair to his client. The court described these practices as "troublesome" but not decisive in examining Argovitz's conduct while negotiating the Gamblers' contract. *Id.* at 547.

88. *Id.*

89. *Id.* at 548.

the transaction.

c. Holding

The court, recognizing the clear fiduciary nature of this agent-principal relationship, held that even though Sims' contract with Houston may have been fair to him, it was still voidable.⁹⁰ The court noted that an agent's loyalty requires that an agent not have a personal stake that conflicts with the principal-player's interest in a given transaction.⁹¹ When the agent has a personal interest which is antagonistic to the player's interest, fraud on the part of the agent is presumed.⁹²

The court had found that Argovitz could have properly continued with the representation if: (1) he had provided Sims with full knowledge of his interest in the transaction; (2) he had disclosed every material fact known to him which might affect Sims; and (3) having such knowledge, Sims had freely consented to the transaction.⁹³ Thus, Sims would have been required to be aware of Argovitz's financial interest, any risks caused by such a conflict, and the alternative courses of actions that were available at the time of the negotiations.⁹⁴

The court stated that it was "dismayed" with the "careless fashion" in which Argovitz performed his negotiation services and found that the agent's fiduciary duty to the client had been breached.⁹⁵ The court rescinded Sims' contract with Houston and remarked: "no man can faithfully serve two masters whose interests are in conflict."⁹⁶

II

Conflict of Interest in Sports Representation

Sports representation is rife with abuse and unethical activity.⁹⁷ One significant aspect of this abuse is conflict of interest,

90. *Id.* ("The self-interest of the agent is considered a vice which renders the transaction voidable at the election of the principal without looking into the matter further than to ascertain that the interest of the agent exists.").

91. *Id.* (citing *Burleson v. Earnest*, 153 S.W.2d 869 (Tex. Civ. App. 1941)).

92. *Id.*

93. *Id.*

94. *Id.* at 549. For a full discussion of informed consent and disclosure, both in this case and in general, see *infra* notes 210-48 and accompanying text.

95. *Detroit Lions*, 580 F. Supp. at 549.

96. *Id.*

97. See *supra* notes 15-26 and accompanying text.

both for agents and lawyers.⁹⁸ Outlined below are sources of potential and actual conflicts in sports representation, and how these sources may run afoul of ethical concerns.⁹⁹

A. Sports Clients With Competing Interests

Differing interests may arise when clients are in competition of one form or another. This is particularly true for a sports lawyer with a broad client list. The nature of the clients involved will largely determine what type of competition is at issue.

The area of player representation, especially in baseball, is governed by free agency rules which allow a relatively high degree of player-initiated movement from team to team.¹⁰⁰ With such movement, there is an increased chance that a lawyer with a large clientele will have clients pitted against each other. In football, where the free agency rules are more restrictive,¹⁰¹ the chances of such a conflict decrease.

98. See generally J. WEISTART & C. LOWELL, *supra* note 1, § 3.19, at 328-31; G. SCHUBERT, R. SMITH & J. TRENTADUE, *supra* note 8, at 147-48; R. RUXIN, *supra* note 14, at 61-74; Sobel, *supra* note 1, at 712-14.

99. The illustrations below are variously referred to as "potential" and "actual" conflicts of interest. It has been argued that such a labelling distinction is of little consequence, "particularly in view of the confusion engendered by attempts to give meaning to these terms." Moore, *supra* note 36, at 222 n.46. While the most difficult area in determining the propriety of multiple representation is said to be the disclosure and obtaining of client consent, *see infra* notes 211-38 and accompanying text, a second major source of confusion is the initial determination that a conflict of interest actually exists. Moore, *supra* note 36, at 216-20. While those situations characterized in this Article as creating an "actual" conflict may be more apt to require lawyer disqualification, the significance of the potential-actual distinction is of far less importance than the paramount issue of initially recognizing the existence of any conflict at all. Such a recognition occurs under the ABA Code when the exercise of the lawyer's "independent professional judgment in behalf of a client will be or is likely to be adversely affected . . . or it would be likely to involve him in representing differing interests." See *supra* notes 58-60 and accompanying text. Under the Model Rules, a conflict exists whenever "the representation of [a] client may be materially limited by the lawyer's other responsibilities to another client." See *supra* notes 64-74 and accompanying text.

100. See J. WEISTART & C. LOWELL, *supra* note 1, § 5.03, at 516-24 and §§ 88-90 (Supp. 1985). The 1981 collective bargaining agreement between the team owners and the Major League Baseball Players Association substantially changed the compensation that teams are due upon the loss of a free agent player. As for player mobility, the agreement remained largely identical to the 1976 agreement, which had allowed players with six years in the major leagues to become free agents by notifying their club (following the season) of an intention to become a free agent. See *id.* at 501-03.

101. See Singman, *Free Agency and the National Football League*, 8 LOY. L.A. ENT. L.J. 259, 259 (1988) (explaining why football players are not presently "free

The following is a list of possible competing interests which an agent or sports lawyer might encounter. The particular conflicts highlighted do not represent an exclusive list; they merely serve to illustrate the myriad of potential sports clients in competition with one another.

1. *Players on the Same Team*

A potential conflict may arise when a lawyer's client list includes several different athletes in the same sport. If the rights to both players are held by the same team, the lawyer may sacrifice or compromise one player's demands in order to negotiate a more favorable contract for the other. Negotiating such a "package deal" may force the lawyer to independently (and perhaps arbitrarily) rank the relative worth of both athletes.¹⁰² Even under the most liberal reading of the rules of ethics, a lawyer in this position would be hard-pressed to pro-

agents" with freedom of choice in the selection of an employer and suggesting "how the current stalemate over free agency could be solved"); J. WEISTART & C. LOWELL, *supra* note 1, § 5.03, at 508-14.

Following the expiration of the latest collective bargaining agreement on August 31, 1987, and the resulting players strike, the NFLPA sought relief in the courts. *See Powell v. National Football League*, 678 F. Supp. 777, 788 (D. Minn. 1988) (suit alleging that player movement restraints violated antitrust attack until the parties reached a bargaining impasse over that issue); *Powell v. National Football League*, No. 4-87-917 (D. Minn. filed July 12, 1988) (Motion by players to declare unrestricted free agency pending resolution on the merits was denied. Despite finding that the players would likely be successful on the merits, and the probability of many players suffering irreparable injury, the court, in part, based its holding on the potential migration of key players to more attractive clubs which "could have a devastating, long-term impact on the competitive balance within the league.").

On February 1, 1988, the NFL owners unilaterally initiated a free agency plan that could escalate player movement in that league, thereby increasing the chances for a lawyer's potential conflict of interest due to competing player interests. Under the so-called "Plan B," each NFL team "protected" 37 players on its roster; all remaining players (619 in the league) were free to move to a new team for a two-month period, without compensation due their former club. *Forbes, Controversial New Plan Goes Into Effect Today*, USA Today, Feb. 1, 1989, at C3, col. 2 (including rules governing the free agency system, as supplied by the Management Council and NFLPA); *see Mihoces, NFL Free Agents: Big Names, Big Money*, USA Today, Feb. 3, 1989, at C1, col. 2; *id.* at C6, col. 3 (including team-by-team listing of protected and unprotected players).

102. *See, e.g.,* Neff, *supra* note 1, at 84. The Kansas City Royals' Hal McRae and Frank White were represented in 1981 contract negotiations by Tony Pace, who was apparently not a lawyer. The representative was reported to have refused to come to terms on White's contract until the Royals agreed to extend McRae's, which had two years to run. *Id.* Royals management claimed that White, who had only one year left on his contract, could have signed a new contract a month earlier if Pace had tried to negotiate. R. RUXIN, *supra* note 14, at 68.

vide each athlete with her undivided loyalty.¹⁰³

A similar conflict could arise if a lawyer represents multiple clients who seek remuneration from a limited fund. For example, a lawyer might represent two NBA players on the same team, where the aggregate salaries of each team in that league must not surpass a "salary cap."¹⁰⁴

2. *Players at the Same Position*

Competing player interests becomes a more acute problem if both athletes play the same position. Sports lawyers must often assist in "agent"-type services, procuring the most attractive employment opportunities for an athlete. A lawyer may be tempted to seek out certain teams that do not have any conflicting clients, potentially bypassing the most attractive employer.¹⁰⁵ Moreover, the lawyer fails to comply with the vigorous representation mandates of the ethics rules by not fully pursuing opportunities for a client.¹⁰⁶

3. *Players on the Same Team and Same Position*

A lawyer's clients may both play the same position on the same team. For example, a sports lawyer might represent several quarterbacks vying for a single roster position. With one available employment opportunity and two clients, the lawyer may be subject to a conflict.¹⁰⁷ The conflict is evident when the lawyer is in a position to bolster one athlete's playing sta-

103. *But see* R. RUXIN, *supra* note 14, at 69 ("multiple representation on the same team can benefit the players," as the agent or attorney—due to her representing both players—can negotiate for more money in total for the players).

104. *See, e.g.*, G. SCHUBERT, R. SMITH & J. TRENTADUE, *supra* note 8, at 135. The 1987 salary cap for the NBA was \$6.7 million for each team of 12 players; that cap was increased for the 1988 season to \$7.232 million. Hannon, *Profile: Stan Kasten*, SPORTS INC., Oct. 3, 1988, at 22. The regulations governing player agents, however, specifically state that representation of two players will not per se create a conflict of interest. *See* NBPA REGULATIONS GOVERNING PLAYER AGENTS § 3(B)(g) (1986) [hereinafter NBPA REGULATIONS] (general rule is to avoid conflict of interest when representing NBA players, "provided that the representation of two or more players on any one club shall not itself be deemed to be prohibited").

105. *See, e.g.*, Neff, *supra* note 1, at 84 (lawyer Leigh Steinberg facing a conflict when quarterback Warren Moon was seeking employment with the New York Giants, a team with another quarterback-client on the roster, Scott Brunner).

106. For example, the lawyer's "independent professional judgment" may be impaired in this situation. *See supra* notes 71-74 and accompanying text.

107. *But see* R. RUXIN, *supra* note 14, at 70 (quoting a United States congressional investigation discussion, where an agent's representation of five pitchers on the same baseball team was argued not to present a conflict; the multiple player-clients benefit the club through competition, which the agent cannot control).

tus with management. Such a scenario obviously would require full disclosure to all interested clients.¹⁰⁸

4. *Coaches in the Same League*

Coaches also present possibilities for conflicts of interest. A lawyer may represent a group of coaches (whether assistant or head coaches), who are all seeking the same position.¹⁰⁹

5. *Coaches on the Same Team*

The head coach and assistant coaches on the same staff may also present the lawyer with a potential conflict. As with the other competing client interests mentioned, a lawyer could possibly favor one client over the other, thus violating the duties of "zealous" representation.¹¹⁰

B. Endorsements

The sports lawyer, depending on the marketability of his client, may be in a position to increase his client's income by securing and negotiating endorsement contracts. Such an opportunity could present a lawyer with a potential conflict of interest.

The lawyer's duty of confidentiality may be jeopardized when a lawyer negotiates an endorsement contract and represents two or more players in the same sport.¹¹¹ Players in the same sport are likely to inquire what other similarly situated players receive from this off-the-field source of income. Dis-

108. See *infra* notes 210-38 and accompanying text.

109. This potential conflict is discussed in terms of the lawyer narrowing his scope of representation and obtaining client consent to such a representation. See *infra* notes 258-61 and accompanying text.

110. See *supra* note 41 and accompanying text. A related area of concern is the sports lawyer with so many clients that she may not have enough time to adequately represent all interests. See R. RUXIN, *supra* note 14, at 71 (Because "few agent[s] are likely to admit to a lack of time, the player must make his own assessment and weigh it as one factor in his choice of agents."). For lawyers, this area is more accurately an issue of competence and the duty to avoid "neglect." See MODEL RULES, *supra* note 35, Rule 1.1 ("A lawyer provid[ing] . . . competent representation to a client . . . requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); C. WOLFRAM, *supra* note 36, at 186-88. See, e.g., *Cortlett v. Gordon*, 106 Cal. App. 3d 1005, 165 Cal. Rptr. 524 (1980) (court recognizing the settled rule that lawyers, whether in large law firms or solo practitioners, are obligated not to undertake legal representation without adequate time).

111. Confidentiality (both for sports agents and lawyers) is discussed elsewhere in this Article as an important policy underpinning conflict of interest generally. See *supra* notes 44-48 and accompanying text.

closing this information to an inquiring player may breach the duty owed to the player with the endorsement contract. Such a breach of confidence could arise, for example, when the lawyer shares the terms of one baseball player's glove or shoe contract with another player.¹¹² Conversely, by not conveying such information to another client, the lawyer may be withholding marketing information which the client expects to hear from his representative.¹¹³

If the lawyer's compensation is a percentage of the client's endorsement income,¹¹⁴ there may be a conflict, because the lawyer has a personal interest in the endorsement contract's outcome.¹¹⁵ An endorsement contract or commercial may not be advisable based on several factors. For example, not only could the product or service endorsed be simply inappropriate considering the image the particular athlete is attempting to put forth, but also too many endorsement arrangements at a certain time in an athlete's career may weaken his or her future marketability. The lawyer, nevertheless, may advise the client to accept the endorsement so that the lawyer can collect his percentage fee.

Another conceivable endorsement conflict would involve a lawyer faced with one advertising or endorsement offer for two clients. A company with an advertising budget allowing for endorsements by one athlete might approach a lawyer with multiple clients, all of whom would be interested in such an endorsement. This situation would be rare, however, due largely to the regional appeal of sports personalities that endorse products.¹¹⁶ Nevertheless, the question of whether each

112. See Neff, *supra* note 1, at 85 (raising questions about lawyer Tom Reich's endorsement negotiations for baseball clients Dave Parker and Tim Lincecum).

113. In this particular situation, as a practical matter, the glove or shoe contract market, in general, would not be the subject of confidentiality principles. An individual endorsement, though, would be protected information. Confidentiality, an important policy consideration for conflicts of interest, generally takes on a different meaning in the area of sports law. See *supra* notes 49-56 and accompanying text.

114. The more typical arrangements, including those from the major sports management firms, give the representative or firm 25% of all income, both on and off the playing field. See, e.g., *infra* notes 170-79 (tennis star Ivan Lendl only obligated to pay a commission of 7.5% while other clients bound to higher rates).

115. This type of personal financial interest could clearly be argued to compromise the lawyer's loyalty to his client. Such a financial stake may influence the lawyer's "independent professional judgment." See, e.g., ABA CODE, *supra* note 35, DR 5-103, 5-104 (requiring lawyers to avoid an acquisition of a personal interest in the client's matters, as well as limiting business relations with clients).

116. Note, though, that many top athletes and sports personalities command na-

client should retain independent counsel is pertinent.¹¹⁷

The service of procuring and negotiating endorsement contracts may be provided by an athlete's lawyer. An athlete may retain a sports lawyer to negotiate his playing contract, while specifically retaining a sports management firm¹¹⁸ for endorsement services.¹¹⁹ Sports lawyers may attempt to segregate the negotiation of endorsement contracts from "practicing law."¹²⁰ However, the lawyer would still be engaged in a separate, law-related occupation¹²¹ under the ABA Code.¹²² Thus, the law-

tional endorsements. *See, e.g., Comte, Jordan to Sign \$19-Mil Nike Deal*, SPORTS INC., July 25, 1988, at 1 (discussing NBA star Michael Jordan's seven-year, \$19 million shoe contract with Nike, potentially the biggest ever from a shoe company). The more "everyday" athletes and personalities, though, typically settle for more regional agreements. *See, e.g., Comte, Endorsements: Coaches For Sale*, SPORTS INC., Apr. 18, 1988, at 40 (Select college coaches have great earning potential, which is at its peak when the combined factors of television exposure, personality, and on-the-court winnings are present.).

117. *See* J. WEISTART & C. LOWELL, *supra* note 1, § 3.19, at 328 (posing hypothetical of a manufacturer seeking endorsements from athletes all represented by the same individual, thus leaving the lawyer "in a position of having to choose between several equally well-suited candidates"). Representing multiple sports clients, conversely, may be advantageous to the players. It is possible that, once a lawyer turns down a company's endorsement offer for a particular athlete, the lawyer could steer the company to other clients that she represents.

118. These sports management firms, such as International Management Group, are discussed elsewhere in this Article in terms of another conflict: event management. *See infra* notes 150-79 and accompanying text.

119. *See* J. WEISTART & C. LOWELL, *supra* note 1, § 3.19, at 331 (agent may be appointed for limited purpose of handling an athlete's investments, or securing endorsement and appearance contracts). *See, e.g., News By Sport: Will Tim Brown Get Endorsement Offers?*, SPORTS INC., Sept. 19, 1988, at 10 (discussing 1987 Heisman Trophy winner Tim Brown's hiring of a lawyer for contract negotiations, and an endorsement firm for marketing and endorsements). Also, the law firm may have an adjoining endorsement company which may be owned or operated by lawyers. *See also* Note, *Crossing the Line: Issues Facing Entertainment Attorneys Engaged in Related Secondary Occupations*, 8 HASTINGS COMM/ENT L.J. 481, 492-93 (1985) (discussing the common involvement of attorneys in representation areas where legal advice is not needed, such as a talent agent or personal manager).

120. Lawyers often attempt to segregate the roles of lawyer and agent. *See supra* note 79.

121. An occupation unrelated to law is one in which the products or services provided by the attorney to customers or clients do not involve services which would be essentially legal in nature. Note, *supra* note 119, at 503 (citing New York State Bar Association Committee on Ethics and Professional Responsibility, Formal Op. 206 (1971), *reprinted in* 44 N.Y. St. B.J. 120 (1972)). Examples of law-related occupations include a lawyer acting as an income tax specialist, loan broker, or insurance agent; occupations unrelated to the law would include a lawyer operating a shopping center, retail store, or manufacturing enterprise. *Id.*

122. The ABA CODE has traditionally been wary of lawyers engaging in dual occupations. One concern is that a lawyer may employ the other occupation as a "feeder" for his law practice, in violation of the rules against solicitation. C. WOLF-

yer would continue to be bound by conflict of interest mandates, as in any practice area.¹²³ Of course, sports agents and others acting on behalf of the athlete, as fiduciaries under agency law, would still be held to conflict of interest standards.¹²⁴

C. Inherent Conflict With Fee Arrangements

Unethical actions in connection with fee arrangements are rampant in sports representation.¹²⁵ One portion of the lawyer's duty to charge reasonable fees¹²⁶ relates to conflict of interest. A lawyer might conduct negotiations in such a way that concern for his own fee is placed above the interests of his client—clearly falling out of the vigorous representation category. Two distinct scenarios often arise. In both situations, the lawyer could be subject to a charge of conflict of interest.

1. *Premature Contractual Agreement*

The first conflict of interest in connection with fee arrange-

RAM, *supra* note 36, at 897. Other reservations of the Bar include lawyer competence, and the chance that the lawyer will be recognized as a specialist, contrary to the Bar's reluctance to permit specialization. *Id.* A dual practice will be allowed under the ABA CODE, as long as the specifications governing professional notices are satisfied. See ABA CODE, *supra* note 35, DR 2-102 (requiring public notices generally to be in a "dignified form").

123. ABA Committee on Ethics and Professional Responsibility, Formal Op. 328 (1972). The opinion provides:

[A] lawyer may conduct, in compliance with DR 2-102(E), his law practice and a second occupation, not law-related, from one office; and he may practice from the same office both as a lawyer and as a member of a law-related profession or occupation, such as a marriage counselor, accountant, labor relations consultant, real estate broker, or mortgage broker, *if he complies* . . . with all provisions of the Code of Professional Responsibility while conducting his second, law-related occupation.

Id. (emphasis added). See also C. WOLFRAM, *supra* note 36, at 897 ("A lawyer continues to remain subject to the lawyer codes, even if the lawyer holds another certificate and even if the lawyer's work with clients involves fields and professions other than law.").

124. See *supra* notes 75-96 and accompanying text.

125. It was reported that one sports agent charged an amount equal to one full contract year of a three-year contract. R. RUXIN, *supra* note 14, at 4. See generally J. WEISTART & C. LOWELL, *supra* note 1, § 3.18.

126. See MODEL RULES, *supra* note 35, Rule 1.5(a) (lawyers bound to charge fees that are "reasonable"); ABA CODE, *supra* note 35, DR 2-106(B) ("Clearly excessive" test will disallow a particular fee when, "after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.").

ments relates to the overall negotiation practices of the lawyer. A lawyer may come to terms with a team earlier than is warranted or than that player's market value would require. The primary motivation for such a premature contractual agreement is directly related to the method the lawyer utilizes to charge her clients.¹²⁷ If the lawyer's billing is based on a percentage of the player's contract,¹²⁸ she is paid when the athlete is paid. The earlier the negotiations are concluded, the sooner the lawyer can collect her fee.

If the lawyer is in fact motivated—to the extent that it affects the ongoing negotiations of her client—to come to an early settlement with the club based on the time that she will collect her fee, then undoubtedly a conflict of interest would exist.¹²⁹ The player, as a consequence of this scenario, is left with non-vigorous representation at a point when the lawyer's role is most crucial.¹³⁰ Fortunately, instances such as these are not widespread.¹³¹

It could also be argued that even a sports lawyer with an hourly rate fee has a conflict, such as a desire to extend nego-

127. The classic argument in the sports law area pits two generally accepted methods for determining fees against each other: hourly, or through a percentage of the total contract's value. See Fraley & Harwell, *Ethics and the Sports Lawyer: The Duty to Charge Fees That are "Reasonable"*; *The Media and the Rule of Self-Promotion*, 6 THE SPORTS LAW. 3 (Fall 1988) (including the arguments on both sides and stating that the "debate . . . is really of little significance in the area of ethics and the sports lawyer," as lawyers are bound to charge fees that are "reasonable").

128. Although the risks of the percentage method include the unethical conduct of collecting up-front payments, it has been argued that the hourly rate method militates against developing a personal relationship with clients. See Neff, *supra* note 1, at 83 (quoting sports lawyer Leigh Steinberg).

129. For a discussion under the ABA CODE on conflicts of interest when lawyers' personal interests conflict with those of clients, see *supra* note 60 and accompanying text.

130. The role of the negotiator in the sports representation industry is a crucial position. This remains the case, despite the fact that many player salaries (particularly those in the NFL and NBA) are "slotted" by teams and representatives based on the athlete's draft position. The skills of the agent or lawyer can make an astonishing difference financially for a particular player.

131. These instances, although not prevalent, are so vivid that the time of the year a player signs is often determined (and easily predicted) by who represents him. Specific examples of this in sports representation usually involve sports agents, although more and more lawyers are serving in those roles. See *supra* notes 27-29 and accompanying text. These agents' livelihood depends on continued representation of professional prospects. Many unscrupulous agents have engaged in intense recruitment of athletes, many times in violation of NCAA rules. See *supra* notes 17-20 and accompanying text.

tiations with the club, thereby increasing the applicable fee.¹³²

2. "Face Value" vs. Present Value

The second scenario for fee arrangement conflicts also relates to lawyers who bill on a percentage basis. A player's contract has two values: the "face value" and the present value.¹³³ The face value is often that figure disseminated to the general public, and includes any deferred payment provisions. The present or actual worth of the contract will be a smaller number.¹³⁴ Despite the real value of the negotiated contract, some lawyers may figure their percentage according to the face value—the inflated figure—of the contract.¹³⁵ In effect, the lawyer is misrepresenting the percentage he charges because his bill is calculated according to a misleading number.¹³⁶

132. The primary emphasis in this discussion is that the sports representation industry involves working with highly compensated individuals, *see supra* note 10, in an extremely competitive setting. This combination arguably requires caution in the area of ethics generally, and conflict of interest in particular, regardless of the fee arrangements chosen.

133. A team benefits greatly by deferring players' salaries. Conversely, players and their representatives typically seek contracts with greater "up-front" value, such as signing bonuses. In terms of sports representation, salary comparisons among agents and lawyers clearly distinguish contracts with this greater present value and the face value. *See, e.g., Fichtenbaum, Rookie Salaries Soar 20%-Plus*, SPORTS INC., Oct. 24, 1988, at 1 (1988 NBA salary survey includes separate listing of amounts of average deferred compensation in individual contracts along with average and median player salaries).

134. To illustrate, suppose that an agent or lawyer negotiates a five-year player contract for \$5 million. Assuming, for hypothetical purposes, that the player is paid at the end of each year, the present value (at a discount rate of 10%) is \$3.7 million. *See D. KIESO & J. WEYGANDT, INTERMEDIATE ACCOUNTING* 236 (4th ed. 1983) (defining present value as the "amount that must be invested now to produce the known future value"; present value is "always a smaller amount than the known future amount because interest will be earned and accumulated on the present value to the future date"). In most player contracts, the only actual immediate payment is the player's signing bonus, if any. All yearly salaries, unless otherwise provided, are paid weekly during that portion of the year consisting of the actual season.

135. This issue of the *value* of the negotiated salary must be compared to the first conflict of interest possibility of this section: sacrificing a client's interest by signing the client early to collect a fee. The former of the two issues would arguably fit not as a conflict of interest issue, but as an issue of "reasonable" fees and the ethical provisions thereunder. *See supra* note 126.

136. To combat this scenario, league players associations have specifically allowed a lawyer or agent to collect a fee only as the athlete is paid. *See, e.g., NBPA REGULATIONS, supra* note 104, § 4(B) ("It is the intent of these Regulations that the player agent shall not be entitled to receive any fee for his services until the player receives the compensation upon which the fee is based. Consistent with this objective, a player agent is prohibited from including any provision in a fee agreement with a

Another problem area involves the basic structure of a player's salary. For various reasons,¹³⁷ an athlete may be best served by income deferral, rather than accelerated compensation, such as a signing bonus. A lawyer may disregard these needs and structure the athlete's salary so that compensation is greater in the initial years of the contract, once again, with sights set on his own interests, rather than the client's.¹³⁸ The lawyer's personal interest in collecting his percentage as soon as possible creates a possible conflict of interest.¹³⁹

D. Advising the Amateur Athlete

National Collegiate Athletic Association (NCAA)¹⁴⁰ rules forbid any student-athlete with remaining eligibility from entering into an agreement (whether orally or in writing) with an agent to negotiate a professional sports contract.¹⁴¹ These amateur rules do not, however, prevent a student-athlete from "securing advice from a lawyer concerning a proposed profes-

player whereby the player becomes obligated to make any fee payment to the agent in advance of the player's receipt of the compensation upon which the fee is based.").

137. Such reasons might include the athlete's immediate financial needs, or (considering the athlete's strengths, weaknesses, and team's personnel needs) the player's suitability for a particular team. *See generally* J. WEISTART & C. LOWELL, *supra* note 1, § 3.17, at 321.

138. *See, e.g.,* Burrow v. Probus Management, Inc., No. 16-840, at 6 (N.D. Ga., Aug. 9, 1973) (unpublished order) (cited in J. WEISTART & C. LOWELL, *supra* note 1, § 3.17, at 321) (agent who advised athlete to accept an up-front bonus not acting in client's best interest, as it was "for the purpose of acquiring immediate funds for the benefit of the [agent]"). J. WEISTART & C. LOWELL, *supra* note 1, § 3.17, at 321 (A recurring criticism is that agents too frequently negotiate for terms which will insure that they are paid immediately," thus disregarding the athlete's needs.).

139. *See generally* E. GARVEY, *THE AGENT GAME* 31, 37 (1984); G. SCHUBERT, R. SMITH & J. TRENTADUE, *supra* note 8, at 136; Sobel, *supra* note 1, at 712.

140. The NCAA is a voluntary association whose approximately 900 members, by joining the organization, agree to abide by certain terms and conditions of membership. Membership institutions include almost all of the major four-year colleges and universities in America. Membership obligates the individual athletic departments to operate consistently with NCAA legislation. Wong & Ensor, *The NCAA's Enforcement Procedure—Erosion of Confidentiality*, 4 ENT. & SPORTS LAW. 1, 13 (1985).

141. NCAA CONST. art. III, § 1(c), *reprinted in* NCAA MANUAL 10. The provision provides in part:

Any individual who contracts or who has ever contracted orally or in writing to be represented by an agent in the marketing of the individual's athletic ability or reputation in a sport no longer shall be eligible for intercollegiate athletics in that sport. An agency contract not specifically limited in writing to a particular sport or particular sports shall be deemed applicable to all sports.

Id. (citations omitted).

sional contract."¹⁴² Therefore, a lawyer is free to discuss an eligible student-athlete's professional career, generally, "unless the lawyer also represents the student-athlete in negotiations for such a contract."¹⁴³

A lawyer could encounter a potential conflict of interest when advising such a student-athlete, particularly if the lawyer expected to represent him once he embarked on his professional career. Obviously, if the client is advised to turn professional, the lawyer gains a new client.¹⁴⁴

The sports lawyer must always be aware of his own motives when advising a student-athlete. He is obligated to make a due diligence search among coaches, scouts, and experts in the sport concerning the player's draft status, both in that particular year and in other possible years. Market research for the particular sport is equally crucial to help determine the player's immediate and future salary potential. Other considerations include the player's maturity, as a person and as an athlete, and the ever-present possibility of an injury. If it is in the best interests of the player to remain an amateur for another season, the lawyer must be prepared to advise him of that.

E. Players Association Lawyers

It has been asserted that lawyers who are employed by a players association¹⁴⁵ face an actual conflict of interest when they also represent member-players of the association.¹⁴⁶ For

142. *Id.*

143. *Id.*

144. See MODEL RULES, *supra* note 35, Rule 7.3 comment ("Furthermore, the lawyer seeking the retainer is faced with conflict stemming from the lawyer's own interest, which may color the advice and representation offered the vulnerable prospect.") (emphasis added).

145. For a discussion of collective bargaining in sports and the advent of players associations' viable collective bargaining unions, see J. WEISTART & C. LOWELL, *supra* note 1, § 6.01, at 778.

146. See Sobel, *supra* note 1, at 713-14; G. SCHUBERT, R. SMITH & J. TRENTADUE, *supra* note 8, at 135. See also Neff, *supra* note 1, at 83-85. Attorney Larry Fleisher has concurrently served as General Counsel to the National Basketball Players Association and lawyer for players in that league; lawyer Gary Holthus lists the Pro Bowlers Tour and several individual bowlers as clients. Fleisher, along with Alan Eagelson, who represents hockey players and is employed by the National Hockey League Players Association, "may be privy to information not available to other [attorneys] . . . [a]nd there surely are times when [they] must act officially in a way that's at odds with the specific interests of one or more of their individual clients. Are Eagelson and Fleisher [attorneys] or union bosses first?" *Id.* at 83-84.

example, the interests of the National Football League Players Association, as a whole, may differ from those of an individual player.

Common issues at the negotiating table include player mobility, compensation, disciplinary measures for players who violate league rules, and other general "terms or conditions of employment."¹⁴⁷ The wide range of salaries in the various leagues¹⁴⁸ and the inherent instability of employment in sports cause individual parties to have widespread interests. Such varying interests may result in a single player—such as a superstar—finding his lawyer, who also represents the players association, at collective bargaining meetings arguing for positions adverse to his. In fact, an individual's employment benefits might have to be sacrificed to reach an agreement with management. This type of agreement may have the effect of aiding lower-level employees at the expense of the superstar athlete-client. The lawyer's conflict of interest here is clear and disqualification should be considered.¹⁴⁹

F. Event Management

Some lawyers or agents may be in a position not only to represent many athletes, but also to control the athletic events in which clients participate, a scenario that leaves such persons "actually running those sports."¹⁵⁰ The example cited most often involves the world's largest sports management firm, International Management Group (IMG).¹⁵¹ Firms of this type¹⁵²

147. J. WEISTART & C. LOWELL, *supra* note 1, § 6.08, at 813 (discussing the National Labor Relations Act's definition of the term "collective bargaining," including "wages, hours, and other terms and conditions of employment").

148. In the NBA, while the minimum league salary is \$100,000 (the highest among the major three professional team sports), salaries of players are well over \$2 million a year, with Patrick Ewing, Kareem Abdul-Jabaar, and Magic Johnson making over \$3 million annually. See Fichtenbaum, *Surprise! Stars' Salaries Are Up*, SPORTS INC., Nov. 7, 1980, at 3.

149. See, e.g., INQUIRY INTO PROFESSIONAL SPORTS, *supra* note 14, at 7 (reporting on a NLRB ruling that, based on conflict of interest grounds, two agents representing players in the Major Indoor Soccer League could not be officials of the MISL Players Association).

150. Neff, *supra* note 1, at 83.

151. See generally Cooney, *The Real Army Behind Arnie and Greg*, GOLF DIGEST, Oct. 1987, at 66-76. The firm has 21 offices in 14 countries, and some 500 employees worldwide. The IMG client list includes 350 athletes in many sports, most notably in golf and tennis. *Id.* at 68, 72.

152. Many firms similar to IMG have been organized in the past ten years. This discussion is not directed solely to them. See Cook, *Sports Marketing*, BUSINESS

offer a wide variety of services to the sports industry: legal representation of individual athletes, procurement and negotiation of endorsement and promotional opportunities, and managing and packaging events in which the athletes compete.¹⁵³ Some firms even televise the event through a subsidiary.¹⁵⁴ This grip on the sports industry is so strong that opponents of IMG allege that an actual conflict of interest exists between IMG and its clients.

Proponents of these management companies claim that event managers cannot guarantee a first-class sports tournament if they do not have first-class players under their control.¹⁵⁵ These firms formulate the idea for the event, organize it, and go to great lengths and expense to ensure its success. Proponents argue that because the firms have taken large risks in creating these events,¹⁵⁶ it would not be "moral, proper, or legal" to deny them the right to control the events.¹⁵⁷ While these significant business risks have admittedly translated into substantial income for the firms, it has been argued that such risks have also advanced and improved the various sports.¹⁵⁸ Those currently opposing simultaneous player representation and event management—the very ones assisted by these risks—may have forgotten the gains made by IMG.¹⁵⁹

WEEK, Aug. 31, 1987, at 48, 52 (noting that the "Big Three" sports firms, IMG, ProServ, and Advantage International, dominate the market, but "there are more than 500 such companies in the U.S. today, up from fewer than a dozen five years ago").

153. Firms such as IMG and ProServ are most commonly known for the management of golf and tennis events. See, e.g., Cooney, *supra* note 151, at 71 (explaining how IMG organized the World Match Play Championships and the European Tournament Players Championships, both golf tournaments in England).

154. An IMG subsidiary, Trans World International, is the world's largest independent source and distributor of televised sports programming. It produces and develops many sporting events, such as Wimbledon, NFL Football, and the U.S. Open. *Id.* at 73.

155. Cook, *Mark McCormack Does Everything but Play the Game*, BUSINESS WEEK, Aug. 31, 1987, at 52.

156. One stated risk taken by such event managers is the availability of television advertising for the event. *Id.*

157. *Id.* (quoting attorney Mark McCormack, founder of IMG).

158. Comte, *Trouble is, No One is in Charge: Mega-Agents Control Tourneys, But the Sport is Facing a Volley of Power Plays*, SPORTS INC., Aug. 29, 1988, at 16, 17 (quoting Ray Benton, former president and CEO of ProServ, as stating that "[a] very large part of the growth of tennis can be attributed to the business risks taken by ProServ and IMG").

159. *Id.* at 17 (claiming that entities, formerly assisted by the risks taken by event managers, now state: "We don't need you anymore.").

1. *The Sports Management Scenario*

The power of sports management firms is best illustrated by an example. A firm such as IMG may create an entirely new golf tournament. After procuring corporate sponsorship, the firm might steer its players to the event,¹⁶⁰ which results in the firm representing both "payers and payees."¹⁶¹ These firms may also get paid for conducting special events during the tournament. The final "frightening" move occurs when the firm holds back several clients from another tournament to undermine the rival.¹⁶²

This influence can even be taken a step further. Representation of individual athletes in sports such as golf and tennis is obviously a centerpiece for the success of these firms. Up-and-coming athletes often train at specialized camps devoted exclusively to professional development.¹⁶³ Some sports management firms have extended their sphere of influence by acquiring several of these camps and then giving them "a pipeline into the future, in the inside track of signing some of the brightest stars of the future."¹⁶⁴

2. *Formal Charges Filed*

The immense authority of these management firms has not gone unnoticed. One sports committee urged the British government to investigate IMG for possible conflicts of interest,¹⁶⁵

160. It is commonplace for golf and tennis players to receive appearance fees for specialized tournaments and non-PGA or Grand Slam events. Such fees are guaranteed regardless of a player's final finish in the event. See Neff, *supra* note 1, at 83 (claiming that appearance money may eliminate an important incentive to win, reducing some tournaments to mere exhibitions); see also *infra* notes 172-75 and accompanying text (describing the process known as "packaging," where a management company, in an attempt to generate more profits, lowers one player's fees in order to include other players also represented by the firm).

161. Neff, *supra* note 1, at 83. These management firms may receive upwards of 25% of an athlete's gross revenues, including any off-the-field income (such as from promotions and endorsements). Cooney, *supra* note 151, at 68.

162. See, e.g., Cooney, *supra* note 151, at 71. This article explains how IMG created the Piccadilly World Match Play Championships and then "flexed its muscle[s]" to hold back Jack Nicklaus, Arnold Palmer and Gary Player from the Alcan Golfer of the Year Tournament in England. *Id.*

163. See Comte, *Pressing the Junior Court: Tomorrow's Tennis Stars are Signing Contracts Today*, SPORTS INC., Sept. 5, 1988, at 42 (discussing intense competition for up-and-coming tennis stars by sports management companies; such recruiting begins when the athletes are as young as 12 years old).

164. Comte, *supra* note 158, at 17 (noting IMG's recent acquisition of the prestigious Nick Bollettieri tennis camps in Florida).

165. Cooney, *supra* note 151, at 70. See also Cook, *supra* note 155, at 52 (noting

because IMG concurrently conducted tournaments, represented players, and negotiated foreign television rights for several tournaments.¹⁶⁶ The Men's International Professional Tennis Council (MTC)¹⁶⁷ brought suit in federal court against IMG and ProServ for conflict of interest and restraint of trade,¹⁶⁸ seeking to outlaw those firms, and all firms that represent individuals, from also running tournaments.¹⁶⁹

Tennis star Ivan Lendl also sued a sports management company, his former representative, ProServ.¹⁷⁰ The original com-

that a British government commission inquiry remarked that "the situation is pregnant with conflict of interest").

166. Cook, *supra* note 155, at 52.

167. The MTC, the governing body of men's professional tennis in the United States, is made up of three factions: (1) the Association of Tennis Professionals (ATP); (2) the various tournament directors; and (3) the International Tennis Federation. Comte, *Men's Council May Disband: Last-Ditch Proposal Doesn't Stop ATP Tour*, SPORTS INC., Oct. 31, 1988, at 3. The ATP, failing to agree on such issues as the control of the Grand Prix Circuit and increased prize money for players, has attempted to launch its own tour, which may alter the current structure of the MTC. *See id.*

168. *See* Cook, *supra* note 155, at 52 (noting the federal court case based on conflict of interest and restraint of trade and quoting Michael Davies of the MTC that "[t]heir conflicts and entanglements now threaten our sport to the extent that we feel the agents must now choose whether they will represent players or tournaments They can't do both").

169. Comte, *supra* note 158, at 17 (quoting MTC administrator Marshall Happer: "[t]ournaments feel intimidated by these agents because they hold so much power We've outlawed them from running tournaments in 1989 and they're screaming bloody murder"). This article summarizes the "monopolistic" controls of the firms: "[t]hey dominate most of the 79 Grand Prix events, managing the tournaments, marketing them, selling TV rights, providing the players, shopping for sponsors and even handing the trophies to the winners on site [They] tak[e] a percentage of the action, from the appearance fees they have their tournaments pay their players to ticket sales." *Id.*

It appears that this suit by the MTC, as well as the Ivan Lendl suit, *see infra* note 170, will not force these management firms to make an election between managing events or representing individual athletes, as the case was settled out of court. *See* Smith, *MTC Lists 1990 Tour, Union Will Counter*, USA Today, Dec. 2, 1988, at C3, col. 1. Interestingly, though, the management firm Advantage International, founded in 1983 by former ProServ partners, has made a determination that it will only "represent players . . . [and not] control the forum they're going to play in." Cook, *supra* note 155, at 53.

170. *See* Lendl and Taconic Enterprises, Inc. v. ProServ, Inc., Donald L. Dell, Jerry Solomon and Alonzo Monk, No. B-88-254 (D. Conn. filed May 5, 1988) [hereinafter Lendl Complaint]. This Lendl action was a counter-suit to ProServ's original \$7 million action, brought in Washington D.C. *See* ProServ, Inc. v. Taconic Enterprises, Inc. and Ivan Lendl, No. 88-0353 (D.D.C. filed Feb. 11, 1988). ProServ initiated its action when Lendl, under contract with ProServ, split with the company to form his own management firm. *See* Muiz, *Lendl's Counterpunch*, SPORTS INC., May 9, 1988, at 3.

The suit was settled out of court. *See Update: Tennis*, USA Today, Nov. 29, 1988,

plaint, seeking more than \$15 million in damages, alleged that ProServ had a conflict of interest and had breached its fiduciary duty owed to Lendl.¹⁷¹

The focus of Lendl's suit was his claim that ProServ actively engaged in "packaging" his talents with other clients.¹⁷² According to Lendl's complaint, packaging occurs when a management company commits a client to merchandising arrangements, appearances, and exhibitions, at less than favorable terms, as a means of diverting income to their other tennis player clients. The complaint alleged that this increased ProServ's commission income,¹⁷³ due to ProServ's general billing methods; the majority of clients of the management company were obligated to pay markedly higher rates than Lendl.¹⁷⁴ This practice seemingly violates the duties of undivided loyalty and vigorous representation, which must be adhered to when representing multiple clients.¹⁷⁵

Lendl also alleged that event management coupled with player representation amounts to a conflict of interest. The lawyers representing Lendl stated:

ProServ frequently acted in a dual role as the operator or paid representative of an exhibition or event in which defendants also negotiated with the event's sponsor to supply the services of Lendl. The sponsor's role in a men's tennis event is largely confined to purchasing the right to promote the sponsor's name in connection with the event. The "operator" of a

at C11, col. 1. Under the terms of the settlement, Lendl was not obligated to make any money payments; however, he agreed to continue paying ProServ a 7.5% commission, see *infra* note 174, on all endorsement arrangements he signed while his was represented by ProServ. *Briefs*, SPORTS INC., Dec. 5, 1988, at 51.

171. Other claims included fraud, breach of contract, diversion of funds and business opportunities, false assertions, misappropriation and conversion, and violation of federal racketeering laws. See Lendl Complaint, *supra* note 170.

172. *Id.* at 10-12.

173. *Id.* at 10. The complaint alleges that ProServ "exploited Lendl's unique reputation and his ranking as the world's number one tennis player to obtain appearance and merchandising opportunities for lesser known ProServ clients thereby increasing ProServ's revenues." *Id.* For a short discussion of appearance fees, see *supra* note 160.

174. The suit claims that Lendl was under contract with ProServ to pay the company 7.5% of his income. Other clients were bound with the company for rates of 20 to 25%. Lendl Complaint, *supra* note 170, at 10. Thus, in an endorsement with Avis, Inc., Lendl allegedly received less compensation overall, due to Proserv's multiple clients. The package of negotiations for other ProServ clients—bound to pay higher commissions—provided a "net overall increase in fees earned by ProServ from other players." *Id.* at 11.

175. See *supra* notes 40-48 and accompanying text.

men's tennis event is the person or entity who is obligated to pay the expenses of the event, including compensation to the players. In exchange, the operator is entitled to receive the revenue generated by the event. Because of the multiple roles played by ProServ—as operator, owner, sponsor's representative and player representative—there arises frequent opportunities for ProServ to abuse its position and to exploit the trust [that] is held by its clients.¹⁷⁶

Lendl alleged that since his appearance fees were consistently less than his actual market value, ProServ had exploited him to maximize its own income.¹⁷⁷ Lendl further asserted that ProServ “fraudulently concealed from plaintiffs ProServ's conflict of interest in its dual role as operator and induced Lendl to accept . . . appearance fee[s] substantially below his usual fee[s] for such . . . event[s].”¹⁷⁸ According to Lendl, he received smaller fees because of ProServ's multiple clients, and at times he received no fee at all because ProServ was allegedly “engaged in a pattern and practice of diverting business opportunities away from Lendl . . . to ProServ's other clients.”¹⁷⁹

G. Dual Representation of Coaches and Players

Representing athletes and coaches in the same league,¹⁸⁰ especially on the same team, can also present a potential conflict of interest.¹⁸¹ National Football League (NFL) Commissioner

176. Lendl Complaint, *supra* note 170, at 12-13.

177. See, e.g., *id.* at 14-15 (stating that a ProServ-operated event, a Georgia tournament sponsored by AT&T, “induced” Lendl to accept an appearance fee of \$150,000 for the five-day event, when Lendl's normal fee, “had it been negotiated at arm's length, would have been at least twice that amount”). In a 1988 exhibition event in Osaka, Japan, Lendl received \$60,000 as an appearance fee, when the “market value for Lendl's appearance was \$100,000.” *Id.* at 7. It was reported that Lendl discovered this discrepancy after his split with ProServ, and later ProServ agreed to an \$85,000 fee. Muiz, *supra* note 170, at 3.

178. Lendl Complaint, *supra* note 170, at 14.

179. *Id.* at 16 (stating that Lendl, with the lowest rate of commission of all of ProServ's clients, suffered because endorsement opportunities were “diverted . . . to . . . lesser ranked, but higher paying, client[s] in order to maximize the commission fees ProServ would be entitled to receive”).

180. For conflict issues when a dual representation includes management employees that actively take part in the negotiations of player contracts, see *infra* notes 193-97 and accompanying text.

181. See Neff, *supra* note 1, at 84 (stating that serving management and labor on the same team can cause problems, and raising the question of attorney Robert Fraley's representation of Philadelphia Eagles' coach Buddy Ryan and a Philadelphia player, Jerome Brown); Rosenblatt, *Robert Fraley: If You Coach, Play or Run a*

Pete Rozelle claims that such representation can "cause significant problems"¹⁸² and that clubs should "seriously consider adopting policies directed at avoiding these troublesome situations."¹⁸³ Simultaneous representation presents the appearance of a conflict in several situations. Depending on the circumstances, such a dual representation may also rise to an actual conflict.

1. *Potential Conflict of Interest*

Procuring employment for one player with another team necessarily takes that talent away from the player's current team, possibly damaging that team's (and coach's) win-loss record. If a lawyer represents both the relocated athlete and the possibly damaged coach, a potential conflict of interest exists.¹⁸⁴ The likelihood of such a conflict increases if the particular professional league allows for liberal player mobility.¹⁸⁵

Team, He Will Represent You, SPORTS INC., Feb. 22, 1988, at 24 (stating that each time a lawyer surfaces as a representative for both NFL coaches and players, the question of conflict of interest is raised).

182. See Appendix (Memorandum from Pete Rozelle to NFL Club Presidents (Sept. 4, 1987) (regarding multiple representation of player and non-player employees)) [hereinafter Rozelle Memorandum].

183. Rozelle Memorandum, Appendix. Rozelle's claims, like the majority of conflict of interest accusations, are grounded on breaches of loyalty and confidentiality. He also makes the distinction between agents and lawyers, and states that applicable bar associations "only partially meet the problem." *Id.* Although stating that such representation is "suspicious," Rozelle does acknowledge that any ethical improprieties "can usually be avoided altogether by full disclosure to all interested parties." *Id.*

In the author's opinion, the Commissioner has made several valid points concerning possible conflict of interest when representing both players and coaches in the NFL. However, arguably, one portion of his memorandum is misplaced. The Commissioner stated that this dual representation allows players to be "delivered" to another team by the lawyer, due to the lawyer's "relationship with a particular club official." See Rozelle Memorandum, Appendix. The only possible concern is that the lawyer's power may encroach on that of the league office. This concern does not relate to conflict of interest—at least not the type traditionally discussed in the area of ethics. An actual conflict of interest has very little to do with a lawyer's ability to relocate a client. In the situation alluded to by the Commissioner, the lawyer's clients (coach and player) can only benefit from such a relocation. The lawyer's scope of representation, see *infra* notes 249-61 and accompanying text, does not include such league concerns.

184. See Rozelle Memorandum, Appendix (alluding to this conflict of interest scenario). See also Neff, *supra* note 1, at 84.

185. As a practical matter, this issue is not as much of a concern in the NFL, where there is a lack of player movement. See *supra* note 101. This must be compared to a sport like baseball, where there is generally more freedom of movement. See *supra* note 100.

Wide disagreement between a lawyer and a team during contract negotiations for a player's salary may necessitate a player's extended holdout from participation with the team. If a lawyer's client list includes that team's coach, the lawyer is susceptible to a conflict of interest.¹⁸⁶ Such a scenario must be compared to the situation in which independent lawyers represent the player and the coach where questions of a lawyer's unfettered loyalty do not arise.¹⁸⁷

Other disputes with the team, in addition to this extended holdout situation, may subject the lawyer to a potential conflict of interest. For example, if an injured player cannot establish that the injury arose in the course of his contract performance, his team may not compensate him.¹⁸⁸ The player can then bring suit against his former team to recover the balance of his playing contract.¹⁸⁹ By representing the player and the team's coach, the lawyer creates an appearance of a conflict or at least diverse or discordant interests.¹⁹⁰ This appearance may also be created when an athlete is terminated by his employer.¹⁹¹ The lawyer's potential conflict of interest is evident if the coach becomes actively involved in a dispute over a

186. Depending on the skills of the player, the coach has a strong interest in the player taking part in training camp and all regular season games because the coach might be without a major contributor to the win-loss record and overall success of that particular season. In this circumstance, the lawyer is presented with a potential conflict of interest.

187. *But see infra* notes 252-55 and accompanying text (scope of a sports lawyer's representation typically does not include the responsibility of supplying talent).

188. The team's duty to compensate the athlete for medical expenses incurred and salary lost when the player is injured is often disputed. Most professional sports contracts state that the team is obligated for these expenses only (1) when the athlete proves that the injury arose from performing his contract, and (2) when notice of the injury was given within a time period specified in the agreement. *See generally* J. WEISTART & C. LOWELL, *supra* note 1, § 3.06, at 223.

189. This common player grievance is essentially a question of causation: whether the cause of the injury was related directly to the athlete's participation in practice or competition under the current contract, or was a result of some action or condition which arose prior to the contract or in the course of an off-the-field activity. *Id.*

190. *See, e.g.,* Rosenblatt, *supra* note 181, at 26 (reporting a possible conflict of interest over a player's injury, due to the involvement of the coach—also represented by the same lawyer—in the proceedings).

191. Standard player contracts typically provide several grounds for the team to terminate its relationship with the athlete. The club could end the relationship "if the athlete (1) is not physically fit, (2) fails to exhibit sufficient skill and ability in the particular sport, (3) fails to observe club and league rules, including disciplinary rules, or (4) otherwise materially breaches the contract." J. WEISTART & C. LOWELL, *supra* note 1, § 3.07, at 236.

proper termination.¹⁹²

2. *Actual Conflict of Interest*

The potential conflict from the dual representation of coaches and players may, in some instances, rise to an actual conflict of interest.¹⁹³ As with many of the possible conflict scenarios, such a dilemma occurs during the lawyer's salary negotiations with the team on the player's behalf. The role of team negotiator, at least in the three major professional sports leagues, is not customarily served by a member of the club's on-the-field staff.¹⁹⁴ If the particular coach, as part of his job, takes an active role in these negotiations, the lawyer encounters an actual conflict.¹⁹⁵ When a represented coach

192. For example, in various professional leagues, whether the athlete is in proper physical condition or has the requisite degree of skill is customarily submitted to the discretion of the team's coach. *Id.* at 237. The standard form player contract utilized in the NFL prior to 1977 provided that a team could terminate an athlete

if, in the opinion of the Head Coach, Player does not maintain himself in such excellent physical condition or fails at any time during the football seasons included in the terms of this contract to demonstrate sufficient skill and capacity to play professional football of the caliber required by the League, or by the Club, or if in the opinion of the Head Coach the Player's work or conduct in the performance of this contract is unsatisfactory as compared with the work and conduct of other members of the Club's squad of players, the Club shall have the right to terminate this contract.

Id. (citing NFL Standard Player Contract, § 6 (1975)). The current standard contract in the NFL does not make specific mention of the opinion of coaches; however, as players in that league currently may be terminated for lack of skill or detrimental conduct to the team "in the sole judgment of [the] Club," coaches will still make final determinations as to the athlete's termination, thereby continuing the potential conflict of interest. *See* NFL Standard Player Contract, § 11 (1987) (Skill, Performance and Conduct). Similarly, when a coach recommends disciplinary measures against a player, the lawyer's undivided loyalty may be brought into question. This was a factor in leading a committee of NBA players to prohibit the dual representation of players and coaches in that league. *See infra* notes 205-09 and accompanying text.

193. While the potential conflicts from the dual representation of players and coaches, *see supra* notes 184-92 and accompanying text, would be less likely to mandate lawyer disqualification, the more paramount concern between the "potential" and "actual" conflict distinction is initially recognizing the existence of a possible conflict at all. *See supra* note 99.

194. Such negotiations typically are conducted by the team's general manager, or by persons with titles such as chief negotiator or financial officer. Some teams retain outside counsel for the sole purpose of conducting contract negotiations.

195. This actual conflict of interest has been alluded to in a memorandum to league presidents from the Commissioner of the NFL. *See* Rozelle Memorandum, Appendix (players disadvantaged by the dual representation "particularly, but not exclusively [when the management official is] involved in . . . contract negotiations").

makes decisions regarding the compensation level of individual players, the interests of the lawyer's player-client and coaching-client are pitted against each other. The interests of the lawyer's clients could clearly become so "differing"¹⁹⁶ that disqualification would be the proper course.¹⁹⁷

3. *Reaction From Governing Bodies*

League players associations¹⁹⁸ expressly prohibit concurrent representation of players and certain management personnel.¹⁹⁹ The most obvious conflict of interest occurs when a lawyer actually holds a financial interest in the team, while simultaneously representing players in the same league.²⁰⁰

Governing bodies differ when addressing lawyers and agents

196. See *supra* notes 57-62 and accompanying text.

197. Player representatives encounter other conflicts of interest in addition to player-coach dual representation. An unquestioned conflict would result if a lawyer concurrently represented players and a team or team owner in the same league. Similar to those coaches that take an active role in negotiating individual player contracts, teams have a vested interest in the salary structure of their employee-players.

198. League players associations regulate agents and lawyers by certification programs. Standard regulatory schemes, at least insofar as the three major professional sports league players associations are concerned, make no distinction between agents and lawyers. See Sobel, *supra* note 1, at 731, 734. See generally R. BERRY & G. WONG, *LAW AND BUSINESS OF THE SPORTS INDUSTRIES* 213-23 (1986) (including NFLPA regulations).

199. As players associations' agent certification schemes govern lawyers, these regulations quite obviously provide members of the legal profession with an additional set of guidelines, along with the ABA Code and Model Rules. As for conflict of interest, provisions from these two governing standards will occasionally overlap. For example, the NFLPA requires the dual representation of players and coaches to be disclosed and consented to in writing, see *infra* notes 237-38 and accompanying text. Disclosure and consent provisions under the Model Rules, see *infra* notes 211-19 and accompanying text, would likewise apply to this multiple representation situation, and may or may not dictate that the consent be in writing. But see *infra* notes 231-38 and accompanying text (recommending that potential conflicts in the sports representation area be disclosed and consented to in writing). It is clear that the higher standards of the legal profession will more often than not be the appropriate ethical standard for sports lawyers. Many of the conflicts outlined by this Article, therefore, will require more in-depth disclosure (or even lawyer disqualification), regardless of the players association regulation (or lack thereof) applying to the particular multiple representation scenario.

200. See NFLPA REGULATIONS, *supra* note 78, § 5(B)(1); NBPA REGULATIONS, *supra* note 104, § 3(B)(e); MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION REGULATIONS GOVERNING PLAYER AGENTS § 3(B)(5) (1988) [hereinafter MLBPA REGULATIONS]. See, e.g., *Detroit Lions, Inc. v. Argovitz*, 580 F. Supp. 542 (E.D. Mich. 1984) (sports agent holding a financial interest in the team with which player-client was negotiating). A lawyer that represents players concurrently with a team owner in the same league, as mentioned *supra* note 199, would clearly fall under this general prohibition.

that undertake the dual representation of players and coaches. The NFLPA²⁰¹ and the MLBPA²⁰² do not expressly prohibit such a representation. The MLBPA reviews this dual representation on a case-by-case basis, and considers such factors as the nature of the negotiations, who the individual coach is, and what authority he has.²⁰³ Although the initial presumption is not to allow such a representation, the lawyer will have an opportunity to convince the players association that the relationship will not be damaging.²⁰⁴

The NBPA, on the other hand, prohibits the dual representation of players and coaches or general managers.²⁰⁵ A committee of players²⁰⁶ made this determination based on several of their perceived problems with player and coach representation. One concern is that when a coach recommends disciplinary measures against a player, the agent or lawyer will be unable to focus her full attention on the player's interest.²⁰⁷ The NBPA's concerns reflect the ethical rules in this area generally: the best interests of one player mean that his agent

201. This league allows the simultaneous representation of players and coaches as long as there is full disclosure and client consent. See *infra* notes 237-38 and accompanying text.

202. Under the MLBPA scheme, player agents may be subject to disciplinary action for "[b]eing employed by, serving as an officer of, or representing, either directly or indirectly, Major League Baseball, the American or National Leagues, any Club or affiliated entity, or representing, either directly or indirectly, any management or supervisory level employee or official of them, *without the prior written authorization of the MLBPA.*" MLBPA REGULATIONS, *supra* note 200, § 3(B)(6) (emphasis added).

203. Comments by Gene Orza, Associate General Counsel, MLBPA, at annual Player Agent Seminar, in New York City (July 8, 1988).

Long-standing relationships, for example, will be recognized and respected. Many baseball players go straight into coaching, and this must be taken into consideration; take for example, Pete Rose, who has had the same agent for 21 years. Simple logic tells you that you can't burn all bridges; representation will be allowed under certain circumstances.

Id.

204. *Id.*

205. The NBPA prohibits player agents from "[r]epresenting the General Manager or coach of any NBA team (or any other management representative who participates in the team's deliberations or decision concerning what compensation is to be offered individual players) in matters pertaining to his employment by or association with any NBA team." NBPA REGULATIONS, *supra* note 104, § 3(B)(f).

206. The Committee on Agent Registration and Regulation was made up of league players Alex English, Rolando Blackman, Junior Bridgeman, Quinn Buckner, Norm Nixon, Jim Paxson, and Isaiah Thomas.

207. Telephone interview with George Cohen, Legal Counsel to the NBPA Committee on Agent Registration and Regulation (Aug. 3, 1988) [hereinafter Cohen Interview].

or lawyer should devote undivided loyalty to that player.²⁰⁸

This express prohibition does not necessarily preclude the representation of an NBA coach outside of contract negotiations or team matters. Counsel regarding other matters, such as endorsement opportunities or general legal work, would be permissible. The NBPA rules expressly state that the forbidden dual representation concerns only cases "pertaining to [the coach's] employment or association with any team."²⁰⁹

III

Avoiding the Improprieties of a Conflict of Interest

As the previous section of this Article indicates, there are numerous potential and actual conflicts of interest possibilities facing sports representatives. A lawyer's first duty is to recognize such conflicts.²¹⁰ Following this, the lawyer must confront other issues. This section outlines ways to avoid actual conflicts of interest and possible disqualification and provides an analysis of the applicable ethical rules.

A. Client Consent After Full Disclosure

The ethical rules do not state that any potential conflict of interest automatically precludes a lawyer from undertaking a representation. Such an automatic application of the ethical rules would violate freedom of contract²¹¹ and personal autonomy—the basic right of a client to select which lawyer he be-

208. *Id.* "The solution to disallow representation of coaches was really decided on by the players because they wanted all agents that represent their interests to provide complete loyalty." *Id.* Those formulating this rule did not feel that a compromise stance could be taken, such as allowing consent to the dual representation by fully informing the player of the extent of the coach's representation. "The Committee [on Agent Registration and Regulation] was not concerned with the issues of consent or waiver, or whether or not it is more than an 'appearance' of a conflict or an 'actual' conflict." *Id.* The NFLPA did reach such a compromise position. See *infra* notes 237-38 and accompanying text.

209. See *supra* note 205. "[A]reas outside of this scope, such as an endorsement agreement for a coach, or other similar areas, would likely be held to be outside the employment agreement area, and permissible. We have not had a ruling on that point as of now." Cohen Interview, *supra* note 207.

210. Along with full disclosure of and client consent to the lawyer's multiple representation, this initial recognition by the lawyer of a conflict of interest is the paramount concern in terms of lawyer propriety. See *supra* notes 97-99 and accompanying text.

211. See C. WOLFRAM, *supra* note 36, at 339.

lieves is the most qualified to pursue his various legal entitlements. From a lawyer's point of view, this autonomy reflects "a client's interest in having certain subjective, nonlegal goals recognized as both valid and important."²¹² Such goals include the right of every client to "choose his strategy, plot his fate and rise or fall by his own choices."²¹³

The 1969 ABA Code, under DR 5-105(C), sets the standard for allowing lawyers with a potential conflict between multiple clients to obtain client consent. First, the lawyer must "obvious[ly]" be able to adequately represent both clients' interests.²¹⁴ Second, he must secure consent from each client likely to be adversely affected, "after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment."²¹⁵

The Model Rules also require the lawyer to initially determine if he can adequately represent both clients. This decision mandates that the lawyer "reasonably believe" that simultaneous representation will not adversely affect either client. The dual representation can then continue only if "each client consents after consultation."²¹⁶

The two professional standards require the lawyer to make a good faith determination that representing both clients is proper.²¹⁷ The question nevertheless remains: When can the lawyer "obviously" or "reasonably believe" that he can adequately represent the interests of both clients? The comments

212. Moore, *supra* note 36, at 233-34.

213. *Id.* at 234 n.114 (citing Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 VA. L. REV. 1, 17 (1978)). Autonomy also involves a client's freedom to make his own choices, including the freedom to choose unwisely. Considering this meaning, a lawyer violates clients' autonomy not only if he unilaterally determines that multiple representation would be improper, but also if he permits the clients to consent after first determining that it is in their best interests to do so. *Id.* at 234. The lawyer, recognizing this autonomy, must then determine if multiple representation will be "adequate" under the Model Rules. See MODEL RULES, *supra* note 35, Rule 1.7. See also *supra* text accompanying note 68.

214. ABA CODE, *supra* note 35, DR 5-105(C).

215. *Id.*

216. MODEL RULES, *supra* note 35, Rule 1.7.

217. There will likely be certain circumstances when a conflict is "nonconsentable," thus never requiring a lawyer to make this initial good faith determination. Commentators have stated that both the ABA Code and the Model Rules are inadequate in their treatment of the specific situations when a conflict is nonconsentable. See Moore, *supra* note 36, at 240. The proper focus is not on what the reasonable lawyer believes (as the rules state); rather, the issue is "the conditions under which a client would probably have agreed to relinquish his freedom to decide the question for himself." *Id.*

to Rule 1.7 suggest that the final decision in such a situation should be made by a "disinterested lawyer." This detached decisionmaker may conclude that "the client should not agree to the representation under the circumstances."²¹⁸ If this is the case, it would be improper for the lawyer involved to ask for the clients' consent. This hypothetical disinterested adviser does not actually have to be consulted, however, leaving the standard once again subject to the lawyer's good faith.²¹⁹

B. Guidelines for the Sports Lawyer

Lawyers in sports representation, like all general practitioners, must be adept at identifying any potentially conflicting representation and must take steps in advance to avoid improprieties.²²⁰ As a practical matter, some conflicts may be resolved by informally disclosing all relevant factors to the various clients being represented. This would be advisable, for instance, if the lawyer's client list includes athletes on the same team or coaches in the same sport.²²¹

A threshold issue facing large law firms is determining who actually are the firm's clients.²²² Just as a large law firm compares the participants in "new matters" against its existing client list, a sports lawyer should also compare potential new clients to a roster of existing clients.

If a potential conflict exists, a determination must be made as to whether the lawyer can represent both clients. This decision must be made under the "disinterested lawyer" stan-

218. MODEL RULES, *supra* note 35, Rule 1.7 comment (Consultation and Consent).

219. See C. WOLFRAM, *supra* note 36, at 341 (lawyer "burdened with the conflict is to assess in a dispassionate way whether to undertake the representation"). Although this standard is "rather transparent" and "not much of a test at all," lawyers under the Model Rules approach are provided with some type of objective standard, whatever the lawyer's subjective intentions. *Id.*

220. See generally R. RUXIN, *supra* note 14, at 71-74. Ruxin suggests that the athlete obtain a third opinion from an uninvolved person, such as a non-sports lawyer. Assuming the lawyer does not disqualify himself, the final determination of representation rests with the athlete, even with the potential conflict. The test is whether the lawyer can separate and carry out his functions as if all his clients were represented by different lawyers. *Id.* at 74.

221. See J. WEISTART & C. LOWELL, *supra* note 1, § 3.19, at 329 ("The fact that [lawyers] may represent several players with one club is usually well-known and is presumably accepted by new clients."). Other conflicts must be handled on a more formal basis. For example, the dual representation of players and coaches in the NFL requires certain disclosures in writing. See *infra* notes 237-38 and accompanying text.

222. See, e.g., Miller & Warren, *supra* note 61, at 661.

dard²²³ before the lawyer is formally retained. This initial matter will depend on the particular situation and relevant factors. Generally, though, both clients must have a clear understanding of the advantages and disadvantages of the requested multiple representation.²²⁴ If the lawyer concludes that dual representation can be maintained, the consent of both clients after full disclosure must be obtained.

1. *Degree of Knowledge Required*

The actual request for consent is crucial. In *Detroit Lions v. Argovitz*,²²⁵ the court defined the degree of knowledge and understanding that clients must possess to be fully informed of a potential conflict. The conflict in *Detroit Lions* did not involve two clients with differing interests; rather, it involved a sports agent's conflict of interest and the corresponding general fiduciary principles of agency law.²²⁶ Such principles are not as rigid as the ethical rules facing members of the legal profession, and thus, the case must be interpreted in that light.

Merely informing the client of a general conflicting interest is inadequate to effectively obtain client consent and continue with the representation.²²⁷ Rather, a lawyer must "inform the [client] of all facts that come to his knowledge that are or may

223. See *supra* notes 217-19 and accompanying text.

224. Moore, *supra* note 36, at 240 (stating that the decisions ultimately made as to the advantages of the representation must not in fact be based on "psychological or economic stress, such that the client would probably later regret being coerced into an unwise decision"). This commentator has urged a "capacity for informed and voluntary consent" standard for determining the permissibility of multiple representation in conflict of interest situations. In determining whether dual representation can be maintained, the foremost inquiry is into the advantages and disadvantages to the client. *Id.* Of course, in the sports representation industry, the nature of the parties must be considered, along with the custom within the particular sport and the industry in general. Compare J. WEISTART & C. LOWELL, *supra* note 1, § 3.19, at 329 ("While a formal disclosure of the potential competing interest is the preferred mode, the client's approval may be implied if joint representation is customary in the particular trade.").

225. *Detroit Lions, Inc. v. Argovitz*, 580 F. Supp. 542, 548-49 (E.D. Mich. 1984). For a more complete discussion of the facts and holding of this case, see *supra* notes 81-96 and accompanying text.

226. For a discussion of these principles for sports agents, see *supra* notes 75-79 and accompanying text.

227. The client in this case, Billy Sims, was actually aware of the agent's conflict—that the agent was a part-owner of the football team with which he was negotiating. Sims was in fact present at the press conference when the agent announced that his application for a franchise had been approved. *Detroit Lions*, 580 F. Supp. at 544 (but stating that Sims "did not know the extent of [the agent's] interest in the [team]").

be material or which might affect his [client's] right and interest or influence the action that he takes."²²⁸

The standard given by the court is rigid. One commentator described it as follows: "The impression is left that the court requires a level of disclosure so exacting that it is difficult to imagine a reasonable person continuing to agree to be represented by the agent with the conflict."²²⁹ Despite this strict standard of disclosure, the court did not rule out the possibility of the agent continuing with the representation, assuming he could prove that adequate information was relayed to the client.²³⁰

2. *Form of Consent*

The majority of conflicts of interest, when sports lawyers represent competing client interests,²³¹ or simultaneously represent players and coaches,²³² will fall under the catch-all provisions of the applicable players association agent regulation scheme.²³³ For example, the NFLPA's provision forbids agents and lawyers from "[e]ngaging in any other activity which creates an actual or potential conflict of interest with the effective representation of NFL players."²³⁴ While these regulations call for lawyers to vigorously represent their cli-

228. *Id.* at 548 (quoting *Anderson v. Griffith*, 501 S.W.2d 695, 700 (Tex. Civ. App. 1973)).

229. J. WEISTART & C. LOWELL, *supra* note 1, § 3.19, at 53 (Supp. 1985).

230. All facts that would have influenced Sims' decision to sign with the team were required to be fully disclosed to him by his agent. Those noted by the court include the following: The relative values of the contracts with both teams with which he was negotiating; the significant financial differences between the two competing leagues (that the NFL was more financially stable, and offered more fringe benefits); the actual ownership interest of the sports agent (including his salary with the team); and that Sims currently enjoyed "great leverage," which was not being taken advantage of by the agent. *Detroit Lions*, 580 F. Supp. at 549.

231. See *supra* notes 100-10 and accompanying text.

232. See *supra* notes 180-209 and accompanying text.

233. Such certification schemes generally do not distinguish between sports agents and lawyers. See *supra* note 198. In this situation, players association schemes overlap with the ABA Code and Model Rules provisions for conflict of interest. Both standards, of course, must be considered by lawyers encountering potential conflicts. See *supra* note 199.

234. NFLPA REGULATIONS, *supra* note 78, § 5(B)(2). See also NBPA REGULATIONS, *supra* note 104, § 3(B)(g) (player agents prohibited from "[e]ngaging in any other activity which creates an actual or potential conflict of interest with the effective representation of NBA players"); MLBPA REGULATIONS, *supra* note 200, § 3(B)(8) ("[e]ngaging in any other activity which, in the Association's judgment, creates an actual or potential conflict of interest with the effective representation of

ents, they do not include corresponding guidance as to the form of client consent. The form of client consent will depend on the circumstances, as with other potential conflicts guided by the ABA Code and Model Rules, such as event management²³⁵ and representation of a players association.²³⁶ It is advisable, as a general guideline, for this consent to be in writing. This precautionary measure may appear unnecessary for some of the potential conflict scenarios, but for protection, lawyers should err on the side of safety.

The dual representation of management officials such as coaches and players, under several players associations schemes, must be expressly consented to in writing.²³⁷ In practice, this particular potential conflict is handled by the lawyer furnishing a form that lists any management personnel represented, both past and present. The list is attached to the representation agreement between the lawyer and athlete, with both signing that page. The NFLPA's disclosure and consent provision was adopted as a compromise position between the various contending factions.²³⁸

Players; provided that the representation of two or more players on any one Club shall not per se violate this provision").

Similar conflict of interest regulations prohibit agents and lawyers from engaging in any "business venture" that creates an actual or potential conflict of interest between the representative and the player. *See, e.g.,* NBPA REGULATIONS, *supra* note 104, § 3(B)(e); MLBPA REGULATIONS, *supra* note 200, § 3(B)(5). This general provision could apply to the potential conflict of interest when lawyers engage in procuring and negotiating endorsements for sports clients. *See supra* notes 111-24 and accompanying text. Although the lawyer may delegate such endorsement services to, for example, an endorsement company, she may play a role in such a company. *See supra* note 119.

235. *See supra* notes 150-79 and accompanying text.

236. *See supra* notes 146-49 and accompanying text.

237. *See* NFLPA REGULATIONS, *supra* note 78, § 5(B)(2) (stating that a contract advisor is prohibited from "[f]ailing to disclose in writing to a player, prior to accepting representation of such player, the names and current positions of any NFL management personnel whom he or she has represented or is representing in matters pertaining to their employment by or association with any NFL team").

The Canadian Football League Players Association has remarkably similar provisions regarding conflicts of interest, including a requirement for written disclosure prior to accepting representation of players and management personnel. *See* CFLPA REGULATIONS GOVERNING CONTRACT ADVISORS, Art. IV, §§ (8)-(10) (1985) (Code of Conduct). The similar MLBPA scheme requires express written approval by the players association. *See supra* note 202.

238. Telephone interview with Dick Berthelsen, NFLPA General Counsel (Aug. 1, 1988):

When we dealt with the conflict problem of representing coaches and players, we felt that we could not single out someone in that role. What we ended up with was the current disclosure provision. As a result of this set-

3. *Lawyer Discretion Governs Conflicts*

It could be argued that, based on the *Detroit Lions*²³⁹ case, most otherwise apparent conflicts of interest in sports representation could still be undertaken by lawyers. This is assuming, of course, that proper disclosure has been made and client consent has been obtained.²⁴⁰ *Detroit Lions* concerned as clear a conflict of interest as is imaginable: a part-owner of a team negotiated on behalf of an athlete against that team.²⁴¹ The court, though, held that the concurrent representation would still have been permissible if proper disclosure had been made.²⁴² Under this reasoning, other potential conflicts, such as competing player interests, or representing coaches and players, would likewise be allowable under certain circumstances.²⁴³

The rules of ethics give discretion to those lawyers facing potential conflicts. Under the Model Rules, as previously discussed,²⁴⁴ lawyers are obligated to "reasonably believe" that representation of one client will not "adversely affect" representation of another client.²⁴⁵ Similarly, under the ABA Code, lawyers must "obvious[ly]" be able to adequately represent

tlement type provision, the player, by signing the disclosure statement, waives any right to later complaining that his agent is subject to a conflict.

Id. For a discussion of the treatment of this multiple representation scenario in Major League Baseball and the NBA, see *supra* notes 198-209 and accompanying text. See also Rosenblatt, *supra* note 181, at 24-26 (including various arguments on both sides of the player-coach representation issue in the NFL).

239. See *supra* notes 80-96 and accompanying text.

240. See *supra* notes 211-19 and accompanying text.

241. See *supra* notes 81-83 and accompanying text.

242. See *supra* notes 93-94 and accompanying text.

243. The conflict of interest situations in the sports representation industry do not typically involve actual courtroom confrontations. At a minimum, this can be interpreted as presenting more ambiguity in the ethical rules, and allowing more discretion on the part of the lawyer representing multiple clients. See, e.g., Note, *Outside the Courtroom: Conflicts of Interests in Nonlitigious Situations*, 37 WASH. & LEE L. REV. 161, 163 (1980) ("The [ethics rules] and present case law, however, do not adequately distinguish between litigious and nonlitigious representation and, therefore, fail to address the problems peculiar to conflicts of interests arising in nonlitigious circumstances."). See also ABA CODE, *supra* note 35, EC 5-15 (stating that there are few instances in which a lawyer representing multiple clients in litigation would be justified to continue, yet in matters not involving litigation, a lawyer—if the interests at issue vary only slightly—will be able to continue). In the case of sports clients such as players and coaches, the application of the rules of ethics is less clear-cut, as often representation is solely of a non-litigious nature.

244. See *supra* notes 63-74 and accompanying text.

245. See *supra* text accompanying note 68. See also *supra* notes 216-19 and accompanying text.

both clients.²⁴⁶ These standards, arguably only tests of the client's "best interests,"²⁴⁷ leave the determination to the lawyer's good faith.²⁴⁸

4. *Overriding Issue: Scope of Representation*

In all of the conflict of interest situations outlined by this Article, lawyers are left with a standard under Model Rule 1.7 of whether they "reasonably believe" that a potential conflict will "materially interfere" with their "independent professional judgment."²⁴⁹ The transcending issue throughout conflicts in sports representation is the lawyer's scope of representation.²⁵⁰ A lawyer must fully define his scope of representation, since his obligations only attach to certain services. Once the lawyer's representational capacity is outlined and fully disclosed and consented to by multiple clients,²⁵¹ the obligations that arise become more apparent. It is at this point that a lawyer may reasonably believe that multiple representation may continue.

An illustration of the lawyer's scope of representation is where a lawyer concurrently represents a coach and a player, the latter of whom is engaged in a "holdout" from participation with the team, due to a salary dispute.²⁵² Even though a player holdout may possibly hurt the success of that team's and coach's season,²⁵³ the lawyer's services provided to her client who is a coach, typically do not include the supplying of talent.²⁵⁴ Once the lawyer fully discloses the extent of the multiple representation, the situation will not rise to an actual conflict of interest.²⁵⁵

246. See *supra* notes 214-15 and accompanying text.

247. See *supra* notes 73-74 and accompanying text.

248. See *supra* notes 217-19 and accompanying text.

249. See *supra* notes 71-74 and accompanying text.

250. Compare J. WEISTART & C. LOWELL, *supra* note 1, § 3.19, at 330 ("Thus, the parties may undertake, by formal contract, tacit agreement, or trade custom, to define the agent's obligation in particular circumstances.").

251. See *supra* notes 211-48 and accompanying text.

252. See *supra* notes 186-87 and accompanying text.

253. See *supra* note 186.

254. Similarly, the lawyer who assists in relocating a player with a new team, to the detriment of the represented coach, see *supra* notes 184-85 and accompanying text, does not typically possess the duty of supplying the coach with talent.

255. The lawyer's full disclosure to a player would include any realistic consequences of simultaneously representing the player's coach (or any coach in the same league). For example, would the coach exert any influence on the lawyer such that it might impair the vigorous representation of the player? Would the lawyer feel

The competing player scenario²⁵⁶ illustrates the magnitude of this role-defining requirement. A lawyer may be in a position to bolster one player's status with management so that the player receives more playing time or salary incentives. Obviously, the realities of this situation must be discussed with both players.²⁵⁷ By disclosing the status-raising possibility to both clients, the lawyers' scope of representation is narrowed. Both clients are thus fully aware of whom he is retaining; a client at this juncture could hardly argue that he is the victim of a conflict of interest.

Similarly, when representing competing coaches interviewing for the same job,²⁵⁸ the posture of the lawyer will not typically be that of influencing the decisionmakers for that position.²⁵⁹ Overall, the duty of the lawyer is not actually to secure employment, but to negotiate for benefits once the coach is at that particular position. Of course, the lawyer must scrutinize his role. First, his situation must be fully understood and consented to by all coaches. Second, despite having received full consent to the multiple representation, the lawyer must determine whether his clients can in fact be adequately represented or would instead be more beneficially represented by separate counsel.²⁶⁰

If the lawyer's role includes an influencing aspect—such as a salesman to influence a university or other selection committee—the representation has expanded beyond acceptable lim-

pressure from the coach in certain circumstances? The practical effect of these situations, as well as other relevant questions, all must be disclosed in detailed form to the player. Once disclosure has been made, and a knowing consent given, the client will have waived the right to claim conflict of interest.

When advising an amateur athlete on the prospects of entering the professional draft prior to the expiration of the athlete's amateur eligibility, *see supra* notes 140-44 and accompanying text, the lawyer is also obligated to disclose any personal interest the lawyer may have in possibly acquiring a new client. This disclosure of a possible conflict of interest accompanies other duties of the lawyer, such as making a due diligence search among coaches, scouts, and experts in the sports, as to the athlete's professional potential. *See supra* note 144 and accompanying text.

256. *See supra* notes 100-08 and accompanying text.

257. As a practical matter, few in the representation industry will take these essential steps. The industry's ethical and moral standards have generally fallen below the standards of the legal profession.

258. *See supra* notes 109-10 and accompanying text.

259. The lawyer representing multiple coaches in this situation will normally be interested only after the decision has been made to hire the coach.

260. The lawyer's discretion is a crucial aspect in the initial determination of the propriety of any potentially conflicting representation. *See supra* notes 239-48 and accompanying text.

its and the lawyer must resign. At such a point, the lawyer cannot "reasonably believe," under the Model Rules, that one representation will not materially limit the lawyer's responsibilities to another client.²⁶¹

Once again, the issue of conflict of interest is one of role defining and narrowing. Both lawyer and client must be in complete mutual understanding as to just what purpose the lawyer is hired to fulfill. This process is vital in avoiding a conflict of interest.

Conclusion

Lawyers' conflict of interest in sports representation has become increasingly widespread. The "differing interest" scenarios cover not only many sports, but also a broad range of issues within each sport.

Sports lawyers confront these conflicts at every stage of representation. The lawyer's interest in gaining a client could cloud the objectivity necessary in advising an eligible NCAA student-athlete on the prospects of a professional career. Other interests may also interfere with the lawyer's representation of a client. First, the particular fee calculation method chosen requires scrutiny because of the inherent opportunity for a conflict. This area of concern has application both to player salary negotiation and to off-the-field sources of income, such as product endorsements.

Second, competing interests among a lawyer's existing clients may present potential conflicts. This must be contrasted with those opportunities for a lawyer's personal interests to interfere with representation of the client. These "outside interest" scenarios may include two player-clients battling over one roster spot, or multiple assistant coaches seeking the same position.

A related area is the dual representation of coaches and players. This potential conflict can occur during the player's contract negotiation (such as in a holdout scenario), as well as at a later point, as when a veteran player signs with another club to the detriment of his former coach.

Two other conflict situations also arise in sports representation. Some lawyers have simultaneously represented both a league players association and player-members of that union;

261. See MODEL RULES, *supra* note 35, Rule 1.7.

the lawyer's ability to provide a "vigorous" representation in this situation is questionable. A more common occurrence is the issue of "event management." Lawyers, as well as agents, who currently work for sports management firms not only invent and manage tournaments, but they also represent the individual competitors at that event.

One purpose of this Article is to illustrate that a genuine potential for conflict of interest exists when applying the ABA Code and Model Rules to many situations. However, merely recognizing the possibility of a differing interest does not necessarily dictate the finding of an "actual conflict" and the resulting lawyer disqualification. Lawyers may, at the outset, thoroughly communicate to their clients their scope of representation. This communication must include proper disclosure of the lawyer's various interests. Once an informed client consents to the situation, it is possible, depending on the circumstances, for a lawyer to "reasonably believe" that such interests will not "adversely" affect the adequate representation of the particular client.

Despite the lively debate over the conflict situations in sports representation, not every such instance mandates a *per se* rule of lawyer disqualification. Automatically barring a lawyer from representing competing player interests would have excessively far-reaching results. For one, it would limit clients' access to experienced counsel. The client may feel that the benefits of an experienced lawyer in sports matters would, as a whole, outweigh the drawbacks caused by potential differing interests. Basic notions of client autonomy demand that the client be allowed to make such decisions.

In conclusion, it is necessary to emphasize the importance of ethical concerns facing sports lawyers. In addition to specific instances of unethical conduct, in an overall sense the morals of the "industry" of sports representation have fallen far below the standards of the legal profession. Because of this, the 1980s will be known as a decade of legislation, regulation, and generally increased scrutiny of those who represent athletes and other sports personalities. This trend calls for increased emphasis on professional ethics for lawyers in this area.

Appendix

Sept. 4, 1987

MEMORANDUM TO: NFL Club Presidents

Re: Player Agents - Multiple Representation of Player and Non-Player Employees

Several clubs have raised questions about the propriety of an agent representing both players and coaches or other management employees of NFL clubs.

In my view, common representation of players and management employees can cause significant problems and should be avoided. At the least, such situations create an appearance of impropriety that can be detrimental to particular clubs or to the league as a whole.

One result can be player dissatisfaction. When a player learns that his agent also represents a club management official (particularly, but not exclusively, one involved in personnel decisions or contract negotiations), the player may have reason to suspect that his agent is "low-balling" him because of the agent's relationship with management. Such suspicions could affect the player's morale and performance, produce demands for contract renegotiations, or both.

Sports league player unions are properly suspicious of this type of common representation. The NFL Players Association has a rule requiring NFLPA-certified agents to disclose to their player-clients any representation of club officials. The Major League Baseball Players Association is exploring even stronger rules in this area; MLBPA union head Donald Fehr has called such conflicting representations "intolerable."

The State of Texas has even gone so far as to propose legislation (currently pending) which would make it illegal for a player agent to receive compensation from a professional sports league, franchise, or employee.

While agents who are attorneys are subject to conflict-of-interest sanctions under the professional-responsibility rules of their respective bar associations, those rules only partially meet the problem. Where agents are not licensed attorneys, they are not subject to the rules at all. Further, the right to voice objections rests primarily with the agent's clients; NFL clubs do not necessarily have standing to enforce bar associations' conflict-of-interest rules. Finally, these ethical prohibitions can usually be avoided altogether by full disclosure to all interested parties.

Representation of both players and management employees carries the potential for other abuses that can affect fair com-

pensation within the NFL. This can be true, for example, when a player agent also represents club employees who negotiate contracts or who are involved in personnel decisions affecting players. One abuse could be an agent "delivering" a free agent player to a particular club because of the agent's client relationship with a particular club official. Another could take the form of attempting to manipulate the college draft by pre-draft statements by the player or his agent which they hope will deter some teams from selecting him, with another club having "inside" information as to the player's actual designs or intentions.

Club management employees, including coaches, should therefore be advised to avoid representation by agents who also represent players. At least one club has gone so far as to refuse to negotiate regarding a management employee with an agent who also represented players. We suggest that other clubs seriously consider adopting policies directed at avoiding these troublesome situations.

PETE ROZELLE
Commissioner

